

# The Consequences of Contractual Failure in South African and Scots Law

A comparative study into certain legal effects of termination after breach of contract with consideration of the analytical implications for termination after supervening impossibility of performance/frustration and for termination of a contract which is voidable by reason of improperly obtained consent

Ph.D.

by

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2004



## **Declaration**

I, the undersigned, declare that this thesis has been composed by me; that the work is my own and that the work has not been submitted for another degree at this or any other University.

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## **Abstract**

This thesis considers certain consequences following contractual failure in South African and Scots law in comparative perspective. Three species of contractual failure are under review: termination after breach; termination after supervening impossibility/frustration; and termination of a contract which is voidable by reason of improperly obtained consent. The focus is on the following: (a) the legal effect of termination for breach on the contractual nexus between the parties; (b) the claim which allows a party to enforce a right to a contractual performance after contractual failure; (c) the claim for the return of a contractual performance (or the value thereof) conferred prior to termination for breach; (d) the claim designed to redress the economic imbalances between the parties after supervening impossibility of performance/frustration; and (e) the claims designed to redress the economic imbalances between the parties after termination of a contract rendered voidable by reason of improperly obtained consent.

The central argument is that in choosing between defensible doctrinal alternatives to regulate the consequences of contractual failure, a legal system must not rely exclusively on abstract taxonomic arguments, historical arguments or comparative arguments. I argue that this choice should be made after careful consideration of the principles of recovery underpinning a particular remedy and the consequences of imposing liability according to a particular doctrinal set of rules. The proper doctrinal basis of a particular remedy is the one which, having due regard to the consequences of imposing liability according to a doctrinal set of rules, most accurately reflects these principles of recovery.

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‘... an understanding heart is everything in a teacher, and cannot be esteemed highly enough. One looks back with appreciation to the brilliant teachers, but with gratitude to those who touched our human feelings.’<sup>1</sup>

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<sup>1</sup> Jung, *The Gifted Child* in *The Collected Works of C.G. Jung* (vol. 17, 1954), 144.

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# Chapter 1

## Introduction

### 1.1 Overview

Broadly speaking, contractual failure encompasses any premature cessation of an intended contractual arrangement. In this sense, contractual failure includes not only those contracts which are invalid from the outset but also those contracts which are initially valid but have subsequently been terminated. This thesis focuses on three species of contractual failure in the latter category: termination after breach; termination after supervening impossibility/frustration; and termination of a contract which is voidable by reason of improperly obtained consent.

The consequences of contractual failure in these three species are numerous and complex. It is not intended to consider these consequences in a comprehensive way. Instead, the focus will be on the following:

- (a) The legal effect of termination for breach on the contractual nexus between the parties.
- (b) The claim which allows a party to enforce a right to a contractual performance after contractual failure. This claim is regulated by the doctrine of accrued rights and arises in the first two species of contractual failure.
- (c) The claim for the return of a contractual performance (or the value thereof) conferred prior to termination for breach.

- (d) The claim designed to redress the economic imbalances between the parties after supervening impossibility of performance/frustration.
- (e) The claims designed to redress the economic imbalances between the parties after termination of a contract rendered voidable by reason of improperly obtained consent. The focus will be on the claim for *restitutio in integrum*.

A cursory glance at the contents pages reveals that the bulk of the analysis deals with termination after breach. Aspects of this analysis have important implications for the claims arising in the other two species of contractual failure. These implications are considered in the final substantive chapter.

## 1.2 Structure

After this introduction, this thesis contains six substantive chapters. Chapter two considers the legal effect of termination for breach on the contractual nexus between the parties. Chapter three considers the doctrine of accrued rights. Chapter four considers the disparate academic views on the doctrinal basis of the duty to restore performances (or their value) conferred prior to termination for breach and sets out a theoretical framework to resolve the debate. This framework will then be used in the remaining chapters to answer doctrinal questions about claims (c) – (e). Chapter five considers the duty to restore money and returnable benefits. Chapter six considers the duty to restore inherently non-returnable benefits. Chapter seven considers the claim designed to redress the economic imbalances between the parties after termination for supervening impossibility of performance/frustration and *restitution in integrum* after the

termination of a contract rendered voidable by improperly obtained consent.

### 1.3 Questions and Thesis

The questions considered in this thesis operate on two levels of generality. On the first level, there are seven specific questions of considerable practical and theoretical importance. First, what effect does termination for breach have on the contractual nexus between the parties? Second, when does a right to a contractual performance survive termination for breach and supervening impossibility of performance/frustration? Third, when does the duty to restore performances arise after termination for breach? Fourth, when the duty to restore arises after termination for breach, what is its quantum? Fifth, should the duty to restore performances (or their value) received prior to termination for breach be regulated by the law of contract, the law of unjustified enrichment or sometimes by the law of contract and sometimes by the law of unjustified enrichment? Sixth, is unjustified enrichment the appropriate doctrinal basis for redressing the economic imbalances after supervening impossibility of performance/frustration? Seventh, should *restitutio in integrum* be regulated by the law of contract, the law of unjustified enrichment, or sometimes by the law of contract and sometimes by the law of unjustified enrichment?

The second level contains wider questions which underpin questions three to seven. The central second level question is whether the consequences of contractual failure under review ought to be regulated by the law of contract, the law of unjustified enrichment, or sometimes by the law of contract and sometimes by the law of unjustified enrichment. The following analysis shows that this central question raises one further second level question.

The last decade of scholarship on the central second level question in South African and Scots law has seen a proliferation of arguments for expanding the application of unjustified enrichment. These arguments have relied primarily on the theory that the law of obligations is divided into at least three major branches - contract, delict and unjustified enrichment - with each branch demarcating a largely autonomous territory. According to this theory, the classification of obligations reflects the events which generate legal rights and duties.<sup>1</sup> The type of event which gives rise to a contractual right is consensus (and sometimes reliance) whereas the type of event which gives rise to an enrichment right is the retention of a benefit *sine causa* (without legal ground). This differentiation between the types of events is intended to show that the three branches of obligations give rise to three independent causes of action. Furthermore, underpinning each type of event is one defining or unifying principle: contract concerns binding promises or agreements and unjustified enrichment is based on the principle that no one should be unjustifiably enriched at another's expense.

This theory is used to support the claim that contractual remedies and unjustified enrichment remedies ought to be distinguished from each other by considering the alignment between the unifying principle of one of the branches of obligations and the principle of recovery underpinning a particular remedy. If the aim of a remedy is more closely connected to fulfilling the expectations created by the contract, then the remedy should be contractual. However, if the aim of a remedy aligns more

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<sup>1</sup> Visser, 'Rethinking Unjustified Enrichment: A Perspective of the Competition between Contractual and Enrichment Remedies' (1992) *AJ* 203 at 209; Hutton, 'Restitution after Breach of Contract: Rethinking the Conventional Jurisprudence' (1997) *AJ* 201 at 211-2. Both the preceding authors rely to some extent on the works of Peter Birks and Andrew Burrows. See Birks, *An Introduction to the Law of Restitution* (1989), Chapter 2 and Birks, 'Restitution and the Freedom of Contract' (1983) 36 *CLP* 141 at 146. Birks has subsequently changed some of his views on classification. See for example Birks, 'Misnomer' in Cornish *et al.* (eds), *Restitution: Past, Present and Future. Essays in Honour of Gareth Jones* (1998), 1; Birks, 'Rights, Wrongs and Remedies' (2000) 20 *OJLS* 1 and Birks, *Unjust Enrichment* (2003), chapter 1. See also Burrows, 'Dividing the Law of Obligations' in Burrows (ed), *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (1998), 1.

closely with the principle that no one should be unjustifiably enriched at another's expense, then the remedy should be based on the rules of unjustified enrichment.<sup>2</sup> Those who argue for an increased application of the law of unjustified enrichment after failed contracts consider that claims (c) – (e) fit into the latter category.

This type of scholarship focuses primarily on issues of abstract taxonomic doctrine. Although this scholarship has successfully established that it is theoretically possible to classify these remedies as arising in unjustified enrichment, this finding does not preclude the theoretical possibility of classifying these remedies as contractual. It should not come as a surprise that there are two doctrinal alternatives which could govern these remedies since it is rare for arguments based exclusively on abstract taxonomic doctrine to yield definitive answers to complex legal problems. This raises the next second level question: how should a legal system choose between two defensible doctrinal alternatives?

I will argue that this choice ought to be made after careful consideration of the principles of recovery underpinning a particular remedy and the consequences of imposing liability according to a particular doctrinal set of rules. In my view, the proper doctrinal basis of a particular remedy is the one which, having due regard to the consequences of imposing liability according to a particular set of doctrinal rules, most accurately reflects these principles of recovery. In articulating what is meant by these principles, I will draw on Neil MacCormick's useful explanation. A helpful way to tease out these principles and these consequences is to consider real and hypothetical cases. It will be demonstrated that our intuitions about the just results that ought to be reached in these real and hypothetical cases indicate that three general factors are critical in

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<sup>2</sup> Visser, (1992) *AJ* 208-10; Hutton, (1997) *AJ* 211-2 and MacQueen, 'Unjustified Enrichment and Breach of Contract' (1994) *JR* 137 at 143-4.

distilling the principles of recovery underpinning the remedies under review: the role of the contract price in determining the quantum of recovery after contractual failure; the contractual allocation of risk; and the incidence of fault in the circumstances leading to contractual failure. The last of these factors is also a key feature in distinguishing between contracts terminated for supervening impossibility of performance/frustration and the other two species of contractual failure. This suggests that the features which differentiate the three species of contractual failure also have an important role to play in distilling the principles of recovery underpinning the claims under review.

In respect of the consequences of imposing liability according to a particular set of doctrinal rules, it will be demonstrated that two considerations are critical: first, the law of unjustified enrichment necessarily brings with it the change of position/loss of enrichment defence and secondly, once the claimant's impoverishment is established, unjustified enrichment law has one hand tied behind its back as it is restricted to viewing matters exclusively from the recipient's perspective.

I will argue that the law of unjustified enrichment is in many cases insufficiently sensitive to the principles of recovery underpinning the claims under review. This is for two reasons. First, unjustified enrichment is tied to imposing liability according to a single principle, namely that no one should be unjustifiably enriched at another's expense. Secondly, where liability ought to rest on other principles, the unjustified enrichment doctrines that buttress the general principle are often too blunt or narrow to take these other principles into account. It will be argued that in the majority of cases contract law is, or can be adapted to be, more sensitive to these principles of recovery than the law of unjustified enrichment. This is because contract law is constituted by a broader and more complex set of principles than the law of unjustified enrichment. Furthermore, even where liability does rest on the principle that no one should be



unjustifiably enriched at another's expense, this can often be accommodated by contract law. Accordingly, where a legal system has a choice between a contractual solution and an unjustified enrichment solution, contract law will often enable a more just solution than the law of unjustified enrichment.

## **1.4 Scope of the Comparative Study**

As Scots law and South African law are mixed legal systems, their common heritage suggests that comparative analysis may be fruitful. In this section I will defend the appropriateness of comparative analysis and outline the reasons that ought to guide us when selecting which legal systems to include in the comparative study.

In defence of the importance of comparative analysis, the comparative scholar will undoubtedly have a broader range of solutions from which draw. This reason provides an unlimited justification for selecting any other legal system as a point of comparison. However, there are more subtle reasons which explain why some legal systems are likely to offer more fruitful comparison than others. The first reason is that two legal systems are found to be similar in style, content and structure. This feature is likely to increase the probability of a solution in one legal system being amenable to the other. This justifies comparing South African and Scots law. Both are uncoded mixed legal systems.<sup>3</sup> This means that they have both been substantially influenced, albeit in

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<sup>3</sup> For the characterisation of South African law as a mixed legal system see Zimmermann and Visser, 'Introduction: South African Law as a Mixed Legal System' in Zimmermann and Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996), 1 at 10-12. For the same point about Scots law see Reid and Zimmermann, 'The Development of Legal Doctrine in a Mixed Legal System' in Reid and Zimmermann (eds), *A History of Private Law in Scotland* (2000), 1 at 6.

varying degrees, by the civil law and common law legal traditions.<sup>4</sup> As a result, they have developed similar styles and have much in common, particularly in the law of obligations.

A second reason focuses on the historical development of an area of law or a particular legal doctrine. This reason suggests including in the comparative analysis those legal systems which have had a major influence on a particular area of law or legal doctrine. For example, recent historical analysis of breach of contract in South African and Scots law has shown that the influence of English law and German law has predominated.<sup>5</sup> This justifies comparing both South African law and Scots law with English law and German law.

The comparative analysis in this thesis is not intended to be systematic or comprehensive. Rather, the comparative position will only be considered in those instances where it is deemed particularly relevant. The focus throughout will be on a detailed study of the South African and Scots law.

## 1.5 Terminology

As many legal terms and concepts have divergent meanings in different legal systems, it is important in any comparative study to define certain key terms. Firstly, Scots law and South African law use different terms to refer to the remedy used by the aggrieved party to withdraw from a contract after breach. Scots law uses the term

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<sup>4</sup> Zimmermann and Visser, 'Introduction: South African Law as a Mixed Legal System' in *Southern Cross: Civil Law and Common Law in South Africa* (1996), 2. See also Evans-Jones, 'Receptions, Mixed Legal Systems and the Myth of the Genius of Scots Private law' (1998) 114 *LQR* 228.

<sup>5</sup> Zimmermann and Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996); Reid and Zimmermann (eds), *A History of Private Law in Scotland* (2000); and Zimmermann, Visser and Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (forthcoming, 2004).

‘rescission’ whereas South African law labels its equivalent doctrine ‘cancellation’.<sup>6</sup>

Scots law and South African law also use different terms to refer to the remedy used by the aggrieved party to withdraw from a contract which is voidable by reason of improperly obtained consent. South African law uses the term ‘rescission’ whereas Scots law labels its equivalent doctrine ‘reduction’.<sup>7</sup> In order to avoid potential confusion, I will use the term ‘termination’ to refer to the remedy used by the aggrieved party to withdraw from a contract in both these species of contractual failure.

Contracts which fail as a result of supervening impossibility of performance/frustration are brought to an end automatically by the operation of law. Although no remedy is required to withdraw from contracts which fail as a result of supervening impossibility, ‘termination’ will also be used to refer to the contractual failure of these contracts.

The next potentially problematic term is ‘restitution’. In South African law, ‘restitution’ denotes the reciprocal duty on both parties to restore performances received prior to the termination of a contract for breach.<sup>8</sup> In Scots law ‘restitution’ is the label given to one of the specific enrichment remedies.<sup>9</sup> Both these meanings would be foreign to English common lawyers as ‘restitution’ is generally used in that jurisdiction to describe the set of rules that constitute what civilian lawyers would regard as the law of unjustified enrichment.<sup>10</sup> I will use the term ‘restitution’ to refer to the duty to restore

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<sup>6</sup> For South African law see Van der Merwe *et al.*, *Contract: General Principles* (2003), 369. For Scots law see McBryde, *The Law of Contract in Scotland* (2001), paras 20-04 and 20-05.

<sup>7</sup> For South African law see Van der Merwe *et al.*, *Contract: General Principles* (2003), 121. In South African law, ‘cancellation’ is sometimes used instead of ‘rescission’ in improperly obtained consent cases. See *Davidson v Bonafede* 1981 (2) SA 501 (C) at 505. For Scots law see McBryde, *The Law of Contract in Scotland* (2001), paras 14-63 and 20-05.

<sup>8</sup> Van der Merwe *et al.*, *Contract: General Principles* (2003), 373-4.

<sup>9</sup> *Shilliday v Smith* 1998 SC 725. See also Evans-Jones and Hellwege, ‘Some Observations on the Taxonomy of Unjustified Enrichment in Scots law’ (1998) 1 *Edin LR* 180 at 181.

<sup>10</sup> Burrows, *The Law of Restitution* (2002), 1 and 5-7. See also Smith, ‘The Province of the Law of Restitution’ (1992) 71 *Canadian Bar Review* 672. Cf Birks ‘Misnomer’ in *Restitution: Past, Present and Future*

a contractual performance (or its value) received prior to termination in all three species of contractual failure under review.

## **1.6 Material Included in the Thesis**

The law is stated as at 31 December 2003. Although the same cut off date also applies to literature in print, I have included certain articles which happened to cross my path.

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(1998), 1-2 and Birks, *Unjust Enrichment* (2003), chapter 1 where he argues that English law ought to abandon this usage of the term 'restitution' in favour of the term 'unjust enrichment'.

## Chapter 2

### The Effect of Termination for Breach on the Contractual Nexus between the Parties

#### 2.1 Introduction

The aim of this chapter is to clarify the effect of termination for breach on the contractual nexus between the parties.<sup>1</sup> The key question is whether termination for breach operates retrospectively only; retrospectively as well as prospectively; prospectively only; or sometimes retrospectively only, sometimes retrospectively as well prospectively and sometimes prospectively only? I will argue that there is no magic in these formulations. They are merely legal constructs which attempt to encapsulate the disparate doctrines that make up the overall effect of termination for breach. The real substantive work is done by the doctrines themselves. It is thus critical that a legal system clearly articulates these doctrines and the relationships between them.

That said, the courts and commentators frequently refer to these general formulations to describe the overall effect of termination on the contractual nexus between the parties. If these terms are going to be used, we should use them precisely. This will make it possible to answer the question posed above.

After a detailed consideration of the South African and Scots law, the positions in English law; German law; the *Principles of European Contract Law* (hereafter PECL); and the *Principles of International Commercial Contracts* (hereafter PICC) will be considered for comparative purposes.

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<sup>1</sup> It will be assumed in all chapters dealing with breach that the breach is material and that the contract has been validly terminated for this breach.

## 2.2 South African Law

South African law has not answered the question relating to the effect of termination for breach on the contractual nexus. The academic writers appear somewhat divided on this issue. Some writers are of the view that termination for breach operates prospectively only in all cases whilst other writers are of the view that termination sometimes operates prospectively only and sometimes retrospectively as well as prospectively.<sup>2</sup>

In order to give a proper account of the South African law, it is necessary to consider the key features that have shaped legal thinking about the effect of termination for breach on the contractual nexus between the parties.

### 2.2.1 Roman Law and Roman-Dutch Law: No Generalised Right to Terminate for Breach

Recent historical studies have pointed out that Roman-Dutch law, following Roman law, did not contain a generalised right to terminate a contract for any material breach.<sup>3</sup> Instead, Roman-Dutch law, like Roman law, followed a fragmented approach in terms of which the aggrieved party could only terminate a contract for breach if there

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<sup>2</sup> For the view that termination operates prospectively only see Christie, *The Law of Contract in South Africa* (2001), 625. For the view that termination operates retrospectively as well as prospectively see Hutchison *et al.*, *Wille's Principles of South African Law* (1991), 521-2; De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987), 286 and Van der Merwe *et al.*, *Contract: General Principles* (2003), 376-82.

<sup>3</sup> Harker, 'The Nature and Scope of Rescission' (1980) *AJ* 61 at 67 and Cockrell, 'Breach of Contract' in Zimmermann and Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996), 303 at 320. This was one manifestation of the fact that neither Roman law nor Roman-Dutch law had a general theory of contract in the modern law sense. See also Zimmermann, *Roman Law, Contemporary Law and European law: The Civilian Tradition Today* (2000), 141 where it is pointed out that nineteenth century German *ius commune* also lacked a generalised right to terminate a contract for breach.

was a specific rule granting him the right to do so.<sup>4</sup>

Two of these rules are integral to our understanding of the effect that termination had on the contractual nexus between the parties in Roman-Dutch law. First, termination was permitted where there was an express *lex commissoria*. A *lex commissoria* is a contractual clause expressly allowing the aggrieved party to terminate a contract for specified breaches. In a chapter devoted to the *lex commissoria* Voet says that

‘... if the seller makes it clear that he wishes to employ the benefit of this agreement [i.e. exercise his right to terminate the contract pursuant to the *lex commissoria*], the contract is *ipso iure* dissolved, and the property goes back to the seller with fruits and accruals, since nothing ought to be left in a man’s hands ... in respect of which he has broken faith.’<sup>5</sup>

Furthermore, in another paragraph Voet says the termination of a contract under a *lex commissoria* has the same basic effect as the fulfilment of a resolutive condition: the retrospective termination of contractual obligations *ab initio*.<sup>6</sup>

The second instance where the aggrieved party could terminate a contract for breach was where the subject matter of a contract of sale contained a latent defect. In these cases, the aggrieved party was permitted to terminate the contract with the *actio redhibitoria*. When such contracts were set aside, both parties were under an obligation to restore any performance received prior to termination. This duty to restore was said to be aimed at returning the both parties ‘to the same position as if the contract had not been concluded.’<sup>7</sup>

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<sup>4</sup> Cockrell, ‘Breach of Contract’ in *Southern Cross: Civil Law and Common Law in South Africa* (1996), 320.

<sup>5</sup> Voet, *Commentarius ad Pandectas*, 18.3.2.

<sup>6</sup> See Voet, *Commentarius ad Pandectas*, 18.3.1 where it is said that the happening of the condition specified in the *lex commissoria* had the effect of the ‘sale being dissolved’. In articulating the effects of termination under a *lex commissoria* Voet had in mind the non-payment of the purchase price by the purchaser.

<sup>7</sup> Zimmermann, *The Law of Obligations* (1990), 317. See also D 21.1.23.1; Mulligan, ‘Incompatibility of Damages and Rescission’ (1950) 67 *SALJ* 43; and De Vos, *Verrykingsaanspreeklikheid* (1987), 286. The *actio empti* was also used in Roman law to effect the termination of a contract and the reciprocal restoration of contractual performances. The texts dealing with this remedy do not shed much light on

From these rules, two conclusions can be drawn about the effect of termination for breach on the contractual nexus between the parties in Roman-Dutch law (and by implication, Roman law). First, neither Roman law nor Roman-Dutch law had a coherent theory explaining the effect of termination for breach. This is unsurprising as Roman-Dutch jurists were hardly likely to think in abstract terms about the effects of termination for breach in the absence of a generalised right to terminate a contract for breach.

Secondly, when termination for breach was permitted, Roman-Dutch jurists regarded this as having retrospective effect in the sense that the contract was treated as if it never came into existence. As a result, termination completely extinguished the contractual nexus between the parties.

### 2.2.2 Modern Law

Since the turn of the century, five factors have shaped legal thinking on the effect of termination for breach in modern South African law: (i) the development of a generalised right to terminate a contract for material breach beyond the specific instances recognised in Roman law and Roman-Dutch law; (ii) the development of the rule requiring both contracting parties to restore performances received prior to termination for breach; (iii) the development of the accrued rights doctrine; (iv) the use of the *interesse* theory to calculate contractual damages; and (v) the use of the distinction between primary and secondary obligations to explain contractual damages.

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the effect of termination for breach on the contractual nexus between the parties. See Bodenstein, 'A Few Aspects of the Actio Empti and the Aedilition Actions' (1914) 31 *SALJ* 18, 152, 276 and 393 and (1915) 32 *SALJ* 34.



(i) *Development of a General Right to Terminate a Contract for Breach*

The South African courts, under the influence of English law and Pothier, developed a generalised right to terminate a contract for any material breach.<sup>8</sup> This paved the way for jurists to begin thinking in a more abstract and conceptual way not only about the specific consequences of termination for breach but also about the effect of termination for breach on the contractual nexus between the parties.

(ii) *Restitution*

One doctrine that received specific recognition in the wake of the above development was the duty to restore any benefit received prior to termination. As Cockrell has pointed out, the duty to restore

‘... has been developed with reference to the Roman-Dutch learning on the consequences which attached to cancellation in three analogous contexts: on the basis of an express *lex commissoria*; on the basis of the *actio redhibitoria*; and *restitutio in integrum* ...’<sup>9</sup>

*Restitutio in integrum* is the remedy used to recover benefits conferred prior to the termination of a voidable contract. It is settled law that when such voidable contracts are terminated, they are treated as if they never came into existence. Accordingly, termination operates retrospectively when *restitutio in integrum* is applicable.

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<sup>8</sup> For judicial statements recognising this generalised right see *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 953; *Goldberg v Buytendag Boerdery Beleggings (Edms) Bpk* 1980 (4) SA 775 (A) at 791 and *Spies v Lombard* 1950 (3) SA 469 (A) at 487. Regarding the influence of English law and Pothier see Cockrell, ‘Breach of Contract’ in *Southern Cross: Civil Law and Common Law in South Africa* (1996), 320; Harker, (1980) AJ 69-70 and Zimmermann, *Roman Law, Contemporary Law and European law* (2000), 141-3.

<sup>9</sup> Cockrell, ‘Breach of Contract’ in *Southern Cross: Civil Law and Common Law in South Africa* (1996), 323.

As the same was historically true when a *lex commissoria* and the *actio rhedibitoria* were used to terminate a contract, restitution in South African law developed with reference to three doctrines which pointed towards termination operating retrospectively. This meant that termination extinguished the contractual nexus between the parties in the sense that it was treated as if it never came into existence. It will be demonstrated in subsequent sections that this is not the only possible interpretation of the retrospective effect of termination for breach. Whatever meaning is attributed to the retrospective effect of termination, it is implicit in these cases that termination also operates prospectively in the sense that all unperformed obligations are also extinguished.

(iii) *Accrued Rights*

The doctrine of accrued rights determines which rights to contractual performances survive termination for breach. It is now settled law that a right to a contractual performance survives termination for breach if it is, immediately prior to termination, 'accrued, due and enforceable as well as independent of the executory part of the contract.'<sup>10</sup> The following example illustrates the operation of this rule.

Assume that A lets a flat to B on 1 January for one year. B is to pay a deposit of R2000 immediately and a monthly rental of R1000 on the last day of each month. At the end of April B justifiably terminates the contract for A's breach, vacates the premises and demands the return of his deposit and the rent paid for the first three months. A refuses to repay the rent received and contends that despite the termination, B owes him the rent for

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<sup>10</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 515 and *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd* 1995 (3) SA 187 (A).

April. For reasons which will be explained in chapter three, A's right to claim rent for April survives termination. Furthermore, A does not have to return the rent received. In this case the contractual nexus remains intact after termination for breach in so far as this nexus is represented by the obligations whose correlative rights (i) fall under the doctrine of accrued rights and/or (ii) would have fallen under the doctrine of accrued rights but for the fact that these obligations have been validly discharged by performance. The contractual nexus not represented by either (i) or (ii) is severed by termination.<sup>11</sup> This is what is meant by the prospective effect of termination. Termination for breach operates prospectively *only* if all rights to contractual performances whose correlative obligations have been discharged by performance fall under (ii) and if all rights to contractual performances due and enforceable fall under (i). Both these conditions are met in the above example.<sup>12</sup>

Interestingly, Holmes JA in *Crest Enterprises (Pty) Ltd v Ryckloft Beleggings (Edms) Bpk*<sup>13</sup> justified introducing the accrued rights doctrine into South African law on the basis that it accorded with the principles of English law. As we shall see in section 2.4.2, termination for breach in English law is regarded as operating prospectively in all cases. Given that termination also appears to operate prospectively in cases involving accrued rights, this explains the reference to English law.

This had led one South African author to conclude that termination for breach does not operate retrospectively.<sup>14</sup> This view has rightly been criticised on the basis that it overlooks cases involving restitution where termination operates retrospectively as well

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<sup>11</sup> This refers only to the contractual nexus represented by the primary performance obligations. See section 2.2.2(iv)(c).

<sup>12</sup> These descriptions clearly depend on a deeper understanding of accrued rights and if they appear elliptical, this will be rectified in the following chapter when the accrued rights doctrine is explained.

<sup>13</sup> 1972 (2) SA 863 (A).

<sup>14</sup> Christie, *The Law of Contract in South Africa* (2001), 625.

as prospectively.<sup>15</sup>

The analysis in this section and the previous section establishes that termination for breach sometimes operates retrospectively as well as prospectively and sometimes prospectively only. The doctrines that regulate the consequences of termination for breach must, amongst other things, be capable of defining the dividing line between these two types of cases.

(iv) *Damages: The Differenztheorie and the Effect of Termination on the Contractual Nexus between the Parties*

Two questions encountered in the South African law of damages have had a material impact on legal thinking about the effect of termination on the contractual nexus: first, can the aggrieved party claim damages based exclusively on his negative *interesse* and secondly, what is the theoretical justification for claiming damages according to the aggrieved party's positive *interesse*?

(a) *Basic Structure of Damages in South African Law*

The general principle underlying damages claims in South African law is that the aggrieved party is entitled to a financial award that will place him, as far as possible, in the position he would have occupied had there been no breach of contract (i.e. had the contract been properly performed). This requires a comparison between (i) the aggrieved party's actual financial position now that the damage causing event (the

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<sup>15</sup> De Vos, *Verrykingsaanspreeklikheid* (1987), 286 and 158; Hutchison *et al.*, *Wille's Principles* (1991), 522 and Harker, *The Nature and Scope of Rescission as a Remedy for Breach of Contract* (unpublished Ph.D. Thesis, University of Natal, 1981), 473.

breach of contract) has occurred and (ii) the hypothetical position the aggrieved party would have occupied had the damage causing event not occurred (i.e had contract been properly performed). The quantum of damages is the difference between these two positions.<sup>16</sup> This is essentially the *Differenztheorie* of German law.<sup>17</sup>

The terms 'positive *interesse*' and 'negative *interesse*' are used in South African law to articulate this general principle. The precise relationship between these two terms and the general principle has caused considerable collateral damage to legal thinking about the effect of termination for breach on the contractual nexus between the parties.

#### (b) Pitfalls of Negative *Interesse* Damages

Nienaber J's analysis in *Probert v Baker*<sup>18</sup> will be used to illustrate the above claim. According to Nienaber J, positive and negative *interesse* damages are different in two respects. First, they have different aims. Positive *interesse* damages are said to be forward looking and are calculated by comparing the aggrieved party's actual financial position now that the breach has occurred with the hypothetical financial position that he would have been in presently had the contract been fulfilled. By way of contrast, negative *interesse* damages are said to be backward looking and aim, '...to place the injured party (as well as the party in default), so far as it is feasible to do so, in the position in which he would have been had no contract been made.'<sup>19</sup> It was held the aggrieved party has an election whether to claim damages according to the positive or negative *interesse*

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<sup>16</sup> Lubbe, 'The Assessment of Loss upon Cancellation for Breach of Contract' (1984) 101 *SALJ* 616 at 619.

<sup>17</sup> Hutchison, 'Back to Basics: Reliance Damages for Breach of Contract Revisited' (2004) 121 *SALJ* 51 at 52-3.

<sup>18</sup> 1983 (3) SA 229 (D). The facts are unimportant for present purposes.

<sup>19</sup> *Probert v Baker* 1983 (3) SA 229 (D) at 234. See also Harker, 'Damages for Breach of Contract: Negative or Positive Interesse' (1994) 111 *SALJ* 5 at 7.

measure.

Secondly, Nienaber J held that positive and negative *interesse* damages are intrinsically connected to different types of losses. Positive *interesse* damages are said to consist of lost profits whereas negative *interesse* damages are said to consist of ‘out of pocket expenses.’<sup>20</sup>

If this picture stands up to scrutiny, then termination for breach coupled with a negative *interesse* damages claim will lead to treating the contract as if it never came into existence. In my view, this does not hold. The following example illustrates the point. Assume that A and B enter into a contract whereby A agrees to build a yacht for B according to B’s particular design specifications. The purchase price of R5,000 is payable on delivery of the completed yacht. Before the yacht is complete, B repudiates the contract. A terminates for this breach. When the contract was terminated, A had spent R1,000 making preparations to build B’s yacht. Assume that A can establish that he would at least have broken even on the contract. If we compare A’s financial position now that the breach has occurred with the hypothetical position he would have been in presently had there been no breach, then it becomes clear that he is entitled to claim R1,000 from B. This establishes that the recovery of wasted expenses can be accommodated within the definition of positive *interesse* damages. However, what of the fact that A’s claim can equally be accommodated within the definition of negative *interesse* damages? On close inspection, it turns out that this is only a matter of factual coincidence.<sup>21</sup> This is because the two measures happen to yield the same result in all

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<sup>20</sup> *Probert v Baker* 1983 (3) SA 229 (D) at 234. For a similar association see *Rangers v Wykerd* 1977 (2) SA 976 (A) at 991; 986 and 989 and *Davidson v Bonafede* 1981 (2) SA 501 (C) at 505.

<sup>21</sup> From a theoretical point of view, this coincidence does not detract from the point that such damages are nothing more than an application of the positive *interesse* principle. For judicial recognition of this point see Farlam J in *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) at 483 citing *Commonwealth v Amann Aviation (Pty) Ltd* (1991) 104 ALR 1 (HC) at 130-1.

cases where the aggrieved party would have broken even had the contract run its course. However, in all cases where the aggrieved party would have made a loss on the contract, the negative *interesse* measure will yield a higher sum than the positive *interesse* measure.<sup>22</sup> Accordingly, from the twin facts that the principle underlying damages claims in South African law is identical to the definition of positive *interesse* damages and that the definitions of positive and negative *interesse* damages are not identical (and as a result, can lead to different outcomes) it follows that the negative *interesse* measure of damages (as defined above) is incompatible with the established principle underlying damages claims in South African law.<sup>23</sup> This leads to the conclusion that unless the principle underlying contractual damages is changed, negative *interesse* damages ought to be expunged from South African law.<sup>24</sup> If this is true, then it follows that it is conceptually flawed to see termination for breach coupled with a damages claim as winding the clock back so as to restore the aggrieved party to his pre-contractual position.

One final point about Nienaber J's judgment is noteworthy. Despite the fact that Nienaber J clearly regards termination for breach as operating retrospectively when damages are awarded according to the negative *interesse* measure, it is surprising that he also states that 'cancellation for breach, unlike rescission for misrepresentation and the like, operates *ex nunc* and not *ex tunc*.'<sup>25</sup> These statements are irreconcilable. Nienaber J

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<sup>22</sup> The extent of the difference between the two measures depends on the extent of the difference between the quantum of wasted expenses and the quantum of the overall loss that the aggrieved party would have suffered had the contract been completed.

<sup>23</sup> Of course it would be possible to adopt a rule which favours the negative *interesse* measure, but this is not the South African law.

<sup>24</sup> After spending much of his judgment stating that reliance losses are actually part of the aggrieved party's positive *interesse*, it seems inconsistent to retain, as Farlam J does, the traditional (but mistaken) association of reliance losses and negative *interesse* damages. See *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) at 486. See also *Hamer v Wall* 1993 (1) SA 235 (T); *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W); *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W) at 473; Lubbe, (1984) 101 *SALJ* 622; Harker, (1994) 111 *SALJ* 7; and Reinecke and O'Brien, 'Mora Debitoris en Negative Interesse' (1998) 3 *TSAR* 587. For an excellent note clarifying these issues see Hutchison, 'Back to Basics: Reliance Damages for Breach of Contract Revisited' (2004) 121 *SALJ* 51.

<sup>25</sup> *Probert v Baker* 1983 (3) SA 229 (D) at 235.

was probably anxious to avoid the following doctrinal difficulty. If termination retrospectively extinguishes the contractual nexus in the sense that it is treated as if it never came into existence, then this makes it difficult to find a doctrinal justification for awarding damages according to the positive *interesse* measure which, by definition, looks to the aggrieved party's future fulfilment position. The solution suggested by Nienaber J is unsatisfactory because it is inconsistent with the fact, established in section 2.2.2(ii), that termination for breach operates retrospectively in cases when the right to restitution arises.

This leads naturally to the next question: how have questions concerning the doctrinal justification for claiming contractual damages in South African law impacted on legal thinking about the effect of termination for breach on contractual nexus between the parties?

#### (c) Doctrinal Justification for Damages

Theorists in South African law first thought that it was logically inconsistent to combine the termination of a contract (coupled with the duty to restore performances received) with a claim for contractual damages. This view rested on two assumptions: first, that termination retrospectively extinguished the contractual nexus between the parties in the sense that the contract was treated as if it never came into existence and secondly, that a claim for contractual damages sought to enforce the contract and hence presupposed its valid existence.<sup>26</sup> The logical difficulty of combining these two claims arose because of the obvious incompatibility between the two assumptions.

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<sup>26</sup> See Mulligan, (1950) 67 *SALJ* 39; Hahlo and Kahn, *The Union of South Africa-The Development of its Laws and Constitution* (1960), 499; and Kahn, *Contract and Mercantile Law Through the Cases* (1971), 299. This



Today, it is unanimously accepted that the aggrieved party in South African law can terminate a contract for breach, claim restitution of benefits already conferred and if he is still financially worse off as a result of the breach, claim damages to compensate him for his loss.<sup>27</sup> One explanation of this approach is based on the transformation theory. According to this theory, termination for breach extinguishes only the parties' primary obligations to perform and replaces these with secondary obligations to restore performances received and to pay damages in appropriate cases.<sup>28</sup> The idea is that termination does not extinguish the contractual nexus but merely transforms its content. The transformation theory is clearly incompatible with both assumptions underlying the old approach. If this is true, the retrospective effect of terminating a contract for breach must mean something other than treating a contract as if it never came into existence. According to the transformation theory, the retrospective effect of termination means that only the parties' primary performance obligations are treated as if they never came into existence. The contractual nexus thus continues to exist but is now represented by secondary obligations to restore performances received and to pay damages.

Does the transformation stand up to scrutiny? Although there appears to be no Roman-Dutch authority for the distinction between primary and secondary obligations, it has recently been endorsed by two Appellate Division cases and accordingly, represents the current law.<sup>29</sup>

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position is not defended in the 1988 edition of the latter work. For a discussion of these views see Harker, (1994) 111 *SA LJ* 7.

<sup>27</sup> See for example, Hutchison *et al.*, *Wille's Principles* (1991), 521-2. See also Treitel, *Remedies for Breach of Contract* (1988), 383 where it is said that it should not be assumed that the aggrieved party's liability for damages is extinguished merely because termination operates retrospectively. For a general discussion on combining termination and damages see Treitel, *Remedies for Breach of Contract* (1988), 392-6.

<sup>28</sup> Lubbe, (1984) 101 *SA LJ* 637. See also Harker, *The Nature and Scope of Rescission as a Remedy for Breach of Contract* (unpublished Ph.D. Thesis, University of Natal, 1981), 477.

<sup>29</sup> Cockrell, 'Breach of Contract' in *Southern Cross: Civil Law and Common Law in South Africa* (1996), 324. The two cases are *Atteridgeville Town Council and Another v Livanos t/a Livanos Botbers Electrical* 1992 (1) SA 296 (A) at 304 and *Commissioner for Inland Revenue v Collins* 1992 (3) SA 698 (A) at 711. See also *LT4 Construction v Minister of Public Works* 1992 (1) 837 (C) at 850. For the use of this distinction in English law

Although a number of South African academic writers support the transformation theory, only Gerhard Lubbe and his chief critic, Sally Hutton, explore the theory in any depth.<sup>30</sup> According to Lubbe, the fact that South African law awards damages according to the 'positive *interesse*' measure 'serves as a strong indication that the contractual nexus and the interests generated by it survive cancellation.'<sup>31</sup> In his view, termination 'complemented where necessary by an award of damages, is to be seen as an alternative method of achieving the economic results contemplated by the contract ...'<sup>32</sup> Lubbe's essential point is that the continuation of the contractual nexus between the parties provides the theoretical justification for referring to the terms of the contract when awarding damages after termination for breach.

This explanation of the transformation theory has been attacked by Hutton on two grounds. First, she argues that

'... the positive *interesse* measure is not the only possible way of assessing the loss resulting from a breach of contract: a legal system could just as easily choose to award damages on the basis of negative *interesse*.'<sup>33</sup>

The analysis in section 2.2.2(iv)(b) established that the distinction between positive and

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see *C Czarnikow Ltd v Koufos, The Heron II* [1966] 2 QB 695 at 731; *Ward (RV) v Bignall* 1967 1 QB 534 at 534; *Moschi v LEP Air Services* 1973 AC 331 and *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827. For the possible origins of the distinction see Dickson, 'The Contribution of Lord Diplock to the General Law of Contract' (1989) 9 *OJLS* 441 at 448-51 and Rudden, 'Correspondence' (1990) 10 *OJLS* 288.

<sup>30</sup> For other authors who support this theory see De Vos, *Verrykingsaanspreeklikheid* (1987), 158; Hutchison *et al.*, *Wille's Principles* (1991), 522; Christie, 'Contract' in *The Law of South Africa* (vol. 5, first reissue, part 1, 1994), para. 255 and Lasky, 'Terugtrede Weens Kontrakbreuk-is dit Slegs 'n Halwe Tree Terug' *Responsa Meridiana* (1980) 73 at 76. These authors do little more than state that termination only extinguishes the primary obligations under the contract and replaces these primary obligations with secondary obligations to restore performances received and to pay damages in appropriate cases. Little by way of theoretical justification is provided to support this claim.

<sup>31</sup> Lubbe, (1984) 101 *SALJ* 637. See also Lambiris, 'Restitutio in Integrum on Grounds of Breach of Contract' (1989) 106 *SALJ* 457 and Harker, (1994) 111 *SALJ* 10.

<sup>32</sup> Lubbe, (1984) 101 *SALJ* 636. See also Lubbe and Murray, *Farlam and Hathaway-Contract: Cases, Materials and Commentary* (1988), 593 n4.

<sup>33</sup> Hutton, 'Restitution after Breach of Contract: Rethinking the Conventional Jurisprudence' (1997) *AJ* 201 at 220. See also Van der Merwe *et al.*, *Contract: General Principles* (2003), 377.

negative *interesse* damages collapses into a choice between a rule which takes account of the aggrieved party's fulfilment position and a rule which is designed to restore the aggrieved party to the position he would have occupied prior to the conclusion of the contract. In this light, Hutton's point reduces to the claim that if a legal system awards damages in order to return the aggrieved party to the position he would have occupied prior to the conclusion of the contract, then the measure of damages does not support the transformation theory. Although Hutton is undoubtedly correct, this is irrelevant as a counter to the argument that the transformation theory is supported by the fact that South African law does look to the fulfilment position of the aggrieved party when calculating contractual damages.

Hutton's second criticism is that 'contractual damages do not enforce the contract but compensate a loss: the only real enforcement remedy in this context is specific performance.'<sup>34</sup> Although an award of damages will frequently result in the economic equivalent of specific performance, this is merely a factual coincidence.<sup>35</sup> From a conceptual point of view, Hutton's criticism of this justification of the transformation theory is valid. This is not, however, significant as the transformation theory is sufficiently supported by view that the continuation of the contractual nexus explains referring to the terms of the contract when awarding contractual damages in South African law.

As an alternative theoretical explanation, Hutton suggests that the duty to pay damages is imposed *ex lege*.<sup>36</sup> Hutton provides little clarification of the theoretical

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<sup>34</sup> Hutton, (1997) *AJ* 220.

<sup>35</sup> This will not be the case where the aggrieved party terminates a losing bargain for the contract breaker's (somewhat fortuitous) breach.

<sup>36</sup> This argument is directly connected to Hutton's claim that the duty to restore performances after termination for breach is best seen as resting on the principles of unjustified enrichment rather than on the principles of contract. As such, she is understandably set against a theory which suggests that the law of contract ought to regulate the consequences of termination for breach. For a complete analysis of this argument see section 4.4.2(v).

consequences of this view. It would appear to follow that if the right to claim damages according to the aggrieved party's positive *interesse* is simply imposed as a matter of law, then it is not strictly necessary for the contractual nexus to survive termination for breach. This is less attractive than the transformation theory as the latter provides a clearer theoretical explanation for referring to the terms of the contract when awarding damages for breach.

### 2.2.3 The Effect of Termination for Breach: A Set of Rules

South African law does not have a coherent theory explaining the disparate doctrines that make up the effect of termination for breach. Analysis demonstrated that in respect of the effect on the contractual nexus, these disparate doctrines pull in different directions. This has led to divergent academic views about the effect of termination for breach on the contractual nexus. As the substantive work is done by the doctrines themselves, the lack of a coherent theory describing their cumulative effect has not caused problems in South African law.<sup>37</sup>

What is essential is that these doctrines and the relationships between them are clearly articulated. The following six rules, supplemented by one definition, perform this task.

#### Rule One

*Any performance obligation which is unperformed at the time of termination for breach is extinguished by termination if the right which is correlative to this unperformed obligation does not fall within the doctrine of accrued rights.*

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<sup>37</sup> For the deficiencies of using abstract generalisations describing the overall effect of contractual failure to justify substantive legal rules see Hellwege, 'Unwinding Mutual Contracts: *Restitutio in Integrum* v. *The Defence of Change of Position*' in Johnston and Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 243 at 263-5.

## Rule Two [the corollary of rule one]

*Any performance obligation which is unperformed at the time of termination for breach survives termination for breach if the right which is correlative to this unperformed obligation falls within the doctrine of accrued rights.*

## Rule Three

*A contracting party (X) has a duty to restore to the other contracting party (Y) any contractual performance (or its value) received prior to termination for breach unless Y's right to demand the exact reciprocal performance from X would have fallen under the doctrine of accrued rights but for the fact that X has already fulfilled the obligation that is correlative to Y's right.*

## Rule Four

*A contracting party (X) also has a duty to restore to the other contracting party (Y) any contractual performance (or its value) received prior to termination for breach unless Y's right to demand the exact reciprocal performance from X survives termination for breach because it falls within the doctrine of accrued rights*

## Rule Five

*All clauses designed to have effect after termination for breach are enforceable after termination for breach subject to the restrictions relating to public policy and liquidate damages clauses.*

## Rule Six

*If the aggrieved party has suffered a loss as a result of a breach of contract, he is entitled to an award of contractual damages to place him in the position he would have occupied presently had there been no breach.*

## Definition of an Accrued Right

*An accrued right is a right to a contractual performance that survives termination for breach. [See chapter three for a comprehensive analysis of when this occurs].*

The following table depicts the first four rules:

	UNACCRUED	ACCRUED
UNPERFORMED	Rule 1	Rule 2
PERFORMED	Rule 3	Rule 4

It remains to clarify the overall effect of termination on the contractual nexus between the parties. It was stated in the introduction that in order to work out this effect, the key question is whether termination for breach operates retrospectively only; retrospectively as well as prospectively; prospectively only; or sometimes retrospectively only, sometimes retrospectively as well as prospectively and sometimes prospectively only? The following analysis will demonstrate that it is the latter. In other words, termination for breach has three distinct types of effect.

It is important to bear in mind that the retrospective and prospective effect of termination carry the meanings established above. The three types of effect of termination are as follows. First, there are cases where termination operates retrospectively *only*. This will occur when the requirements of rule three are met without the requirements of rule one or rule two being met. For example, assume that A sells a car to B for R10, 000. After B has paid the purchase price in full, he discovers a defect in the car and terminates the contract. As there are no unperformed performance obligations, rule one and rule two are excluded. As a result of termination for breach operating retrospectively only, rule three dictates that both A and B are obliged to return to each other the purchase price and the car respectively. In addition, A will be obliged to pay contractual damages to B if the requirement of rule five is met.

Secondly, termination can simultaneously operate prospectively and retrospectively. This will occur in cases where the requirements of rule three and rule one are met simultaneously. Assume that the facts are identical to the above example except that instead of making payment for the car in full, it was agreed that B would make payment by monthly instalments. Assume that these instalments were payable on the last day of every month and that termination took place on the last day of the third month. In this case, rule three dictates that A must return all three instalments to B and that B must return the car to A. The requirements of rule three are met because A's rights to B's first three instalments would not have fallen under the accrued rights doctrine if these payment obligations remained unperformed. Whereas rule one is excluded in cases where termination for breach operates retrospectively only, rule one in this case dictates that B's obligation to pay the remaining seven instalments is extinguished by termination. As a result of the combination of rules one, three and four termination operates both retrospectively and prospectively. In these cases, termination completely severs the contractual nexus in so far as this nexus is represented by the unperformed obligations that do not fall under the accrued rights doctrine or would not have fallen under the doctrine but for the fact that such obligations have been performed.

Thirdly, termination can sometimes operate prospectively only. This will occur in cases where the requirements of rule one and/or the requirements of rule two are met without the requirements of rule three or rule four being met. For example, assume that A lets a flat out to B for one year and that B is obliged to pay rent on the last day of each month. Assume also that A commits a breach on the last day of the fourth month and as a result, B terminates the contract. In this case, rule one dictates that B is released from the eight remaining payments obligations. If B has not yet paid rent for the fourth

month, rule two dictates that this payment obligation survives termination for breach.<sup>38</sup> This is because A's correlative right to B's payment obligation falls under the accrued rights doctrine. As neither rule three or rule four applies on these facts, termination for breach operates prospectively only.

## 2.3 Scots Law

The academic writers in Scotland are unanimous in stating that termination for breach operates prospectively only.<sup>39</sup> In order to give a proper account of the Scots law, it is necessary to consider the key features that have shaped legal thinking about the effect of termination on the contractual nexus between the parties.

### 2.3.1 Roman Law and the Institutional Writers

The Scottish institutional writers, like their Roman-Dutch counterparts, relied heavily on Roman law for their legal theory. It was pointed out in section 2.2.1 that Roman law was unhelpful in clarifying the effect of termination for breach on the contractual nexus between the parties. Accordingly, it is unsurprising to find that the institutional writers, much like their Roman-Dutch contemporaries, hardly mentioned the right to terminate a contract for breach much less developed a coherent theory articulating the general effect of termination for breach on the contractual nexus between the parties.<sup>40</sup> The Scottish institutional writers adopted a fragmented approach

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<sup>38</sup> The same holds true if B had not paid rent in any of the three preceding months.

<sup>39</sup> See for example McBryde, *The Law of Contract in Scotland* (2001), para. 20-109; MacQueen and Thomson, *Contract Law in Scotland* (2000), paras 5.24 and 5.46; Scottish Law Commission, *Remedies for Breach of Contract* (Discussion Paper No. 109, 1999), paras 4.38-42 and Gloag, *The Law of Contract* (1929), 621-2.

<sup>40</sup> Johnston, 'Breach of Contract' in Reid and Zimmermann (eds), *A History of Private Law in Scotland* (2000), 175 at 178 and 193.



to breach in terms of which termination was only permitted in a limited number of narrowly defined circumstances.<sup>41</sup> For example, termination was permitted where there was a defect in the quality of the subject matter of the sale; an irritancy of a feu; or a *lex commissoria*.<sup>42</sup> Where mention is made of the effect of termination for breach, it appears that the institutional writers regarded termination as having retrospective effect in the same way that this was understood in Roman-Dutch law and in modern South African law prior to the transformation theory. Thus Stair, speaking about the effects of exercising an irritancy clause, says that the contract 'should be null and void, as if it had never been made.'<sup>43</sup>

### 2.3.2 Modern Law

Since the late nineteenth century, four features have influenced Scottish legal thinking about the effect of termination on the contractual nexus between the parties: (i) the development of a generalised right to terminate a contract beyond the specific instances recognised by the institutional writers; (ii) the question whether an arbitration clause survives termination for breach; (iii) the lack of clarity surrounding accrued rights and restitution; and (iv) the view in Scots law, largely influenced by English law, that termination has prospective effect.

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<sup>41</sup> Johnston, 'Breach of Contract' in *A History of Private Law in Scotland* (2000), 182.

<sup>42</sup> See for example Stair, *Institutions of the Law of Scotland* (1681), 14,5; Bankton, *An Institute of the Laws of Scotland* (1751-3), 17,5 and 9,31-2; and Erskine, *An Institute of the Law of Scotland* (1871), 1,11.

<sup>43</sup> Stair, *Institutions of the Law of Scotland* (1681), 14,5. See also Bankton, *An Institute of the Laws of Scotland* (1751-3) and Bell, *Principles of the Law of Scotland* (1899), s71.

(i) *Development of a General Right to Terminate a Contract for Breach*

The Scottish courts, like their South African counterparts, were responsible for developing a generalised right to terminate a contract for breach beyond the circumscribed instances recognised by the institutional writers. As was the case in South African law, English law was the predominant influence.<sup>44</sup> *Turnbull v McLean*<sup>45</sup> marked the turning point.<sup>46</sup> There it was said that

‘... where one party has refused or failed to perform his part of the contract in any material respect the other is entitled either to insist for implement, claiming damages for the breach, or to rescind [terminate] the contract altogether, except in so far as it has been performed.’<sup>47</sup>

As Johnston has noted, the introduction of a generalised right to terminate a contract for breach meant that Scots law made the same break with Roman law that had occurred in other civilian systems.<sup>48</sup> This development has not paved the way to thinking in abstract terms about the effects of termination for breach to the same extent as the parallel development in South African law.

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<sup>44</sup> This emerges from the fact that the Lord-Justice Clerk in *Turnbull v McLean* (1874) 1 R 730 justified the introduction of a rule allowing the aggrieved party to terminate a contract for breach on the basis that Scots law and English law were essentially identical in this respect. It was pointed out in section 2.3.1 that prior to *Turnbull v McLean*, Scots law did not have a generalised right to terminate a contract for breach. Accordingly, Scots law and English law were in fact at odds in this regard and this reinforces the view that the development of this generalised right in Scots law was largely due to English law influence. See Johnston, ‘Breach of Contract’ in *A History of Private Law in Scotland* (2000), 182-3. See also MacQueen, ‘Scots Law and English Law: The Case of Contract’ (2001) 54 *CLP* 205 at 220-1 and McBryde, ‘Scots Law of Breach of Contract: Mixed Legal Systems in Operation’ (2002) 6 *Edin LR* 5 at 11.

<sup>45</sup> (1874) 1 R 730.

<sup>46</sup> Johnston, ‘Breach of Contract’ in *A History of Private Law in Scotland* (2000), 182-3. See also McBryde, *The Law of Contract in Scotland* (2001), para. 20-92 and MacQueen, (2001) 54 *CLP* 220 where he points out that although *Turnbull v McLean* was the key case in this development, there were forerunners pointing in this direction since the 1850s.

<sup>47</sup> (1874) 1 R 730 at 738. This was reinforced in *Wade v Waldon* 1909 SC 571 at 576.

<sup>48</sup> Johnston, ‘Breach of Contract’ in *A History of Private Law in Scotland* (2000), 194. See also McBryde, (2002) 6 *Edin LR* 11.

(ii) *Arbitration Clauses*

Scots law has grappled with the effect of termination for breach on the contractual nexus between the parties in the context of the question whether an arbitration clause survives such termination. The line of cases begins with *Municipal Council of Johannesburg v D Stewart & Co. (1902)* where it was held that

‘[i]t does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated.’<sup>49</sup>

Similarly, Lord MacKenzie in *Hegarty & Kelly v Cosmopolitan Insurance Corporation Ltd* held that when a contract is terminated, then the ‘contract with all its clauses goes, and amongst them the clause providing for a reference to arbiters.’<sup>50</sup> It is clear that termination for breach was viewed in these cases as operating retrospectively in the sense that the contractual nexus was treated as if it never came into existence.

Subsequent cases have overturned these decisions and it is now settled law that an arbitration clause will survive termination for breach if this is what the parties intended.<sup>51</sup>

Although these subsequent cases did not consider the effect of termination for breach on the contractual nexus between the parties, it is clear that they cannot be reconciled with the view that termination for breach operates retrospectively in the sense that this was understood by the earlier cases.

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<sup>49</sup> 1909 SC (HL) 53 at 56.

<sup>50</sup> 1913 SC 377 at 384.

<sup>51</sup> *Alexander Stephen (Forth) Ltd v JJ Riley (UK) Ltd* 1976 SC 151 at 159 and *Highland Leasing Ltd v Lyburn* 1987 SLT 92 at 94. See also *Sanderson & Son v Armour and Co. Ltd* 1922 SC (HL) 117 and *Scott v Gerrard* 1916 SC 793.

(iii) *Restitution*

Whereas the development of the generalised right to terminate a contract for breach in South African law led directly to the specific recognition of the right to restitution, the same is not true in Scots law. Although academic commentators have recently stated that restitution is one of the necessary consequences of termination for breach, this clarity, as will be demonstrated in chapters five and six, is not as clearly reflected in the case law as it might be. Indeed, the Scottish Law Commission has recently pointed out that a major difficulty in this area is ‘that there are few, if any, decisive authorities but a number of conflicting statements.’<sup>52</sup>

It was pointed out in section 2.2.2(ii) that South African law originally developed the right to restitution with reference to the three doctrines (the *lex commissoria*; the *actio redhibitoria* and *restitutio in integrum*) which pointed towards termination retrospectively extinguishing the contractual nexus between the parties in the sense that this nexus was treated as if it never came into existence. Subsequently, this understanding of the retrospective effect of termination was modified by the transformation theory. As the right to restitution has not undergone a similar historical development in Scots law, neither the courts nor the commentators have realised that termination for breach operates retrospectively in cases where the right to restitution arises. This is one possible explanation why commentators view termination as having prospective effect only.<sup>53</sup>

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<sup>52</sup> Scottish Law Commission, *Remedies for Breach of Contract* (Discussion Paper No. 109, 1999), para. 4.36. This claim is based primarily on the problems associated with *Connelly v Simpson* 1993 SC 391. This case is discussed in detail in chapters 3 and 5.

<sup>53</sup> Another explanation is that this protects the post termination applicability of arbitration, limitation and exemption clauses. See Hellwege, ‘Unwinding Mutual Contracts: *Restitutio in Integrum* v. *The Defence of Change of Position*’ in *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 263.

(iv) *Accrued Rights*

Unlike South African law, accrued rights remain relatively unexplored by the Scottish courts. The clearest judicial statement is found in *Lloyds Bank plc v Bamberger* where the following principle from English law was cited with apparent approval:

[a]lthough rescission [termination] absolves both parties from future performance of their primary obligations under the contract, they are not absolved from primary obligations already due at the time of rescission. Thus claims for debts or arrears of money unconditionally due under the contract may still be enforced. Examples are arrears of rent due under a lease, or instalments of price due prior to rescission.<sup>54</sup>

This dictum points clearly towards termination operating prospectively only. This accords with the position in South African law in certain accrued rights cases.

This connection between South African and Scots law is unsurprising given the twin facts that the accrued rights doctrine in both legal systems has developed with reference to English law and that English law regards termination for breach as operating prospectively only. This provides another explanation for the unanimous view in Scots law that termination for breach operates prospectively only. Indeed, such was the influence of English law that the Lord Justice-Clerk in *Lloyds Bank plc v Bamberger* stated that Scots law and English law are indistinguishable in respect of the effect that termination for breach has on the contractual nexus between the parties.<sup>55</sup>

(v) *Damages and the Prospective Effect of Termination*

The general principle underlying damages claims in Scots law is that the

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<sup>54</sup> 1993 SC 570 at 573. See also *Turnbull v McLean* (1874) 1 R 730 at 738 where it is stated that a contract is rescinded '... except in so far as it has been performed.' For further analysis of both cases see respectively sections 3.3.1(iii) and (ii).

<sup>55</sup> 1993 SC 570 at 573.

aggrieved party is entitled to a financial award that will place him in the position he would have occupied had the contract been duly performed.<sup>56</sup> Scots law does not adopt an 'over-technical' approach to the assessment of loss following breach of contract in the sense that there is no specific model for calculating damages.<sup>57</sup>

Two points about damages in Scots law are noteworthy. First, unlike South African law, Scots law has recognised the conceptual and doctrinal incompatibility between awarding damages based on the above general principle and awarding damages designed to return the aggrieved party to his pre-contractual position. This is clear from *Dawson International plc v Coats Paton plc*<sup>58</sup> where Lord Prosser explicitly rejected an approach which allowed the aggrieved party an election between expectation interest damages and reliance interest damages. Lord Prosser explained that damages were designed to place the aggrieved party in the position it would have been in had the contract been fulfilled and that if the aggrieved party had chosen to claim merely for wasted expenditure, it had to show that this expenditure would have been recovered or, put another way, that the contract was not a losing one.<sup>59</sup> This has prevented Scots law from entertaining the idea, mistakenly put forward in South African law, that awarding reliance loss damages after termination for breach turns the clock backwards so as to restore the aggrieved party to his pre-contractual position.

Secondly, the Scottish commentators have justified awarding contractual damages according to the general principle on the basis that termination for breach does not retrospectively extinguish the contract in the sense that it is rendered null and void

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<sup>56</sup> See for example *Houldsworth v Brand's Trs* (1877) 4 R 369 at 374; *Marshall & Co. v Nicol & Son* 1919 SLT 88 at 90; and *Karlshamns Oliefabriker v Monarch Steamship Co.* 1949 SC (HL) 1 at 18.

<sup>57</sup> Scottish Law Commission, *Remedies for Breach of Contract* (Discussion Paper No. 109, 1999), para. 8.13.

<sup>58</sup> 1993 SLT 90 at 99-100.

<sup>59</sup> The fact that there was no breach in this case means that Lord Prosser's statements regarding the election between reliance loss damages and expectation interest damages are technically *obiter*. See also McGregor, 'The Expectation, Reliance and Restitution Interest in Contractual Damages' (1996) JR 227 at 238-9.

*ab initio*. In order to ensure that some form of the contractual nexus remains intact to justify referring to the contractual terms when calculating damages claims, the commentators have stated that termination operates prospectively only.<sup>60</sup>

### 2.3.3 Theoretical Lessons for Scots Law

In broad terms, the development of a general right to terminate a contract for breach has not led Scots law to think in abstract terms about the effect of termination for breach in the same way as the parallel development in South African law.

Although the view that termination operates prospectively only has not caused Scots law any significant problems, it is less theoretically satisfactory than the view describing the overall effect of termination for breach put forward in section 2.2.3. By adopting this view, Scots law would be able to account for the disparate doctrines that make up the effect of termination for breach.

## 2.4 Comparative Excursus

In line with the scope of this comparative study the position in German law; English law; the PECL; and the PICC will now be considered.

### 2.4.1 German Law

*Rücktritt* is the term used to describe the termination of a contract for breach in

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<sup>60</sup> See for example McBryde, *The Law of Contract in Scotland* (2001), para. 20-109 and MacQueen and Thomson, *Contract Law in Scotland* (2000), para. 5.45.

German law. It also regulates the process of restitution following such termination.<sup>61</sup> The doctrinal basis of *Rücktritt* originally caused considerable difficulty in German law. It was first thought that *Rücktritt* had retrospective effect in the sense that when a contract was terminated for breach, it was treated as if it never came into existence. It follows logically from this that restitution ought to be an enrichment remedy. The doctrinal problem was that there were some instances in German law where restitution was not regulated by the law of unjustified enrichment. This called into question whether *Rücktritt* operated retrospectively in the sense described above. It is now generally accepted that the retrospective effect of termination does not mean that the contract is avoided *ab initio*. Rather, *Rücktritt* is said to transform 'a [contractual] relationship aiming at the implementation of the contractual programme originally agreed upon into a contractual winding-up relationship.'<sup>62</sup> Thus termination only extinguishes the parties' primary performance obligations and replaces these with secondary obligations to restore performances received and to pay damages. This is essentially the transformation theory found in South African law. Although it has not been expressly acknowledged, it is likely that South African academics have drawn on this German theory. From my comments in section 2.2.2(iv)(c), it is clear that I support this approach.

## 2.4.2 English Law

Termination for breach in English law is said to extinguish the parties'

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<sup>61</sup> For more precise description see Markesinis *et al.*, *The German Law of Obligations* (vol. 1, *The Law of Contracts and Restitution: A Comparative Introduction*, 1997), 642-5.

<sup>62</sup> Zimmermann, 'Remedies for Non-Performance: The revised German law of obligations viewed against the background of the Principles of European Contract Law' (2002) 6 *Edin LR* 271 at 306.



unperformed future primary performance obligations.<sup>63</sup> Thereafter the contract breaker is said to be under a secondary obligation to pay damages. Although English law uses the distinction between primary and secondary obligations to explain the right to claim damages after termination for breach, this distinction is not used to explain the right to restitution. As restitution points towards termination operating retrospectively, this omission explains why academic commentators in English law are unanimous in stating that termination for breach operates prospectively only.

#### 2.4.3 International Models: The Principles of European Contract Law (PECL) and The Principles of International Commercial Contracts (PICC)

Both sets of international principles have adopted similar schemes to regulate the effects of termination for breach. Although packaged slightly differently, both codes require the parties to restore performances received prior to termination.<sup>64</sup> It is also clearly stated that neither accrued rights nor clauses designed to operate post termination are affected by termination. Furthermore, the aggrieved party is not prevented by termination from claiming damages according to his expectation interest.

In order to explain the survival of accrued rights, the survival of clauses designed to have post-termination effect and the right to claim damages, the compilers of the PECL expressly state that termination operates prospectively only, as opposed to retrospectively as well as prospectively. It is clear that the compilers wanted to avoid the problems that occur if termination for breach operates retrospectively in the sense that

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<sup>63</sup> *Heyman v Darwins* [1942] AC 356 at 399; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 and *Johnson v Agnew* [1980] AC 367 at 392-3.

<sup>64</sup> PECL Art 9:306-8 and PICC Art 7.3.6(1).

the contractual nexus is treated as if it never came into existence.<sup>65</sup> It was pointed out above that according to the transformation theory, the retrospective effect of termination does not necessarily carry the meaning ascribed to it by the compilers of the PECL.

## 2.5 Conclusions

There is an interesting historical connection between English law, German law, Scots law and South African law regarding the effect of termination for breach on the contractual nexus between the parties. Both Scots law and South African law developed out of Roman law. As Roman law did not recognise a general right to terminate a contract for breach, jurists never worked out a coherent theory explaining the effects of termination for breach. There was little improvement made by either the Roman-Dutch scholars or the Scottish institutional writers. In the early modern period, both South African and Scots law, under the influence of English law, developed a general right to terminate a contract for any breach. This facilitated a clarification of the specific effects of termination for breach (restitution in Scots law being a notable exception) and enabled scholars to think in more abstract terms about the effects of termination for breach on the contractual nexus between the parties.

In developing its theory, Scots law tracked English law by using the distinction between primary and secondary obligations to explain that not all aspects of the contract are extinguished by termination for breach. In line with English law, Scots law maintains that termination for breach operates prospectively only. Although South African law also uses the distinction between primary and secondary obligations, it developed the

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<sup>65</sup> Lando and Beale (eds), *Principles of European Contract Law* (2000), notes to Art 9:305.

transformation theory to account for the right to restitution and to damages. In this way, the theory in South African law resembles German law. As the transformation theory incorporates the right to restitution, South African law rightly acknowledges that termination for breach sometimes operates retrospectively.

I argued that the real substantive work in this area is done by the disparate doctrines that collectively make up the effect of termination for breach rather than by abstract generalisations about this overall effect. This is borne out by the fact that although different legal systems articulate this general effect in different ways, there is commonality regarding the doctrines that make up this effect. It is accordingly critical that Scots law and South African law clearly articulate these doctrines and the relationships between them. I suggested that it was necessary to formulate six rules, supplemented by one definition, to achieve this aim.

As the commentators and courts do refer to the overall effect of termination on the contractual nexus between the parties, we should be precise. It was established that termination sometimes operates retrospectively only; sometimes retrospectively as well as prospectively; and sometimes prospectively only. In other words, termination has three distinct types of effect. The facts of individual cases determine which rule or rules govern the consequences of termination for breach in that case. This, in turn, determines the precise effect of termination on the contractual nexus between the parties.

It was also established that the retrospective effect does not mean that the contractual nexus is treated as if it never came into being. According to the transformation theory, it means that only the primary performance obligations are annulled by termination. These are replaced by secondary obligations to restore performances received and to pay damages. Finally, the prospective effect of

termination means that the contractual nexus is severed only in so far as this nexus is not represented by obligations whose correlative rights (i) fall under the doctrine of accrued rights and/or (ii) would have fallen under the doctrine of accrued rights but for the fact that these obligations have been validly discharged by performance. Termination for breach operates prospectively *only* if all rights to contractual performances whose correlative obligations have been discharged by performance fall under (ii) and if all rights to contractual performances that are due and enforceable fall under (i).

## Chapter 3

### Accrued Contractual Rights

#### 3.1 Introduction

This chapter considers the doctrine of accrued contractual rights in South African and Scots law. This doctrine determines which contractual rights survive termination for breach. A comprehensive understanding of this doctrine is necessary as it can be of considerable importance to establish that a right to receive a performance is an accrued contractual right. For example, it will be easier (and sometimes advantageous) for a contractant claiming money to rely on a contractual term rather than having to institute a restitution claim.

After this introduction, the respective positions in South African and Scots law will be considered. It will be demonstrated that although there is a similarity between the doctrines in two jurisdictions, South African law is conceptually more sophisticated and has much to teach Scots law.

#### 3.2 South African Law

The leading case on accrued rights in South African law is *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd*.<sup>1</sup> In this case, Nienaber J stated that contractual rights survive termination for breach if the right to a performance is, prior to termination, accrued, due and enforceable and independent of the executory part of

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<sup>1</sup> 1986 (4) SA 510 (N).

the contract.<sup>2</sup> This dictum is the key to understanding accrued rights in South African law. In order to appreciate its full import, and to provide a comprehensive study of the South African law, it is necessary to consider the case law chronologically. This case law can be divided into three phases: (a) the cases before *Walker's Fruit Farm v Sumner*<sup>3</sup>; (b) the cases from *Walker's Fruit Farm v Sumner* to *Crest Enterprises (Pty) Ltd v Ryckloft Beleggings(Edms) Bpk*<sup>4</sup>; and (c) the case of *Thomas Construction*. It will be shown that although South African law has clarified accrued rights from a conceptual point of view, some residual difficulties remain in applying the doctrine.

### 3.2.1 Cases before *Walker's Fruit Farm v Sumner*

#### (i) *Webster v Varley*<sup>5</sup>, *Bloch v Michaël*<sup>6</sup> and *Hall v Cox*<sup>7</sup>

These cases involved contracts of sale where the purchase price was payable in instalments and the purchaser, in breach of these payment obligations, failed to pay one or more of the instalments. The question was whether the aggrieved seller could, despite having terminated the contract, claim an instalment that was due but not yet paid. The courts refused the claim on the grounds that it would be inconsistent to allow a claim on the contract after the contract was terminated for breach.<sup>8</sup>

It is now well established that there is no logical or theoretical inconsistency in combining a claim for contractual damages with the termination of a contract. Provided the requirements of the accrued rights doctrine are met, the same is true in respect of

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<sup>2</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 515.

<sup>3</sup> 1930 TPD 394.

<sup>4</sup> 1972 (2) SA 863 (A).

<sup>5</sup> 1915 WLD 79.

<sup>6</sup> 1924 TPD 54.

combining a claim for a contractual performance with the termination of a contract. Accordingly, these decisions rest on a theoretically unsound foundation and do not contribute to our understanding of accrued rights. It will be demonstrated in subsequent sections that a proper application of the current accrued rights doctrine would have yielded the same result reached in these cases.

(ii) *Spenser v Gostelow*<sup>9</sup>

In *Spenser v Gostelow* an employment contract stipulated that an employee's salary was to be paid monthly. On the eleventh of the month the employer terminated the contract as a result of the employee's breach. The employee instituted a claim for remuneration for the eleven days he had worked in that month.<sup>10</sup> Innes CJ held that if an employer dismisses an employee for serious misconduct, then:

'... he is not bound to pay his wages for the remainder of the contract term. But he is not entitled to enrich himself at the expense of the servant by refusing to pay for those services in so far as they have benefited him.'<sup>11</sup>

Accordingly, Innes CJ allowed the employee an enrichment claim for the amount sought.<sup>12</sup>

At this time, the courts were labouring under the misapprehension that it was inconsistent to allow a claim on a contract after termination for breach. This was

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<sup>7</sup> 1926 CPD 228.

<sup>8</sup> See *Webster v Varley* 1915 WLD 79 at 80 which was cited with approval in *Bloch v Michal* 1924 TPD 54 at 58.

<sup>9</sup> 1920 AD 617.

<sup>10</sup> *Spenser v Gostelow* 1920 AD 617 at 626.

<sup>11</sup> *Spenser v Gostelow* 1920 AD 617 at 631.

<sup>12</sup> For an application of the *Spenser v Gostelow* 1920 AD 617 dictum in a lease context see *Seligson v Alley* 1928 TPD 259.

because termination was thought to extinguish the contractual nexus retrospectively in the sense that it was treated as if it never came into existence. This explains why the court looked to the law of unjustified enrichment to find a doctrinal peg on which to hang the contract breaker's claim. Because of this misapprehension, the decision does not contribute greatly to our understanding of accrued rights.

Once again, it will be demonstration that the contract breaker's right to claim remuneration under the contract would not survive termination under the current accrued rights doctrine. Today, the contract breaker's claim, whatever its true nature, would be a claim for restitution.

### 3.2.2 *Walker's Fruit Farm v Sumner*<sup>13</sup>

In *Walker's Fruit Farm* an employment contract stipulated that an employee would receive a guaranteed minimum payment if he did not earn a specified amount by way of commission. The employer breached the contract and the employee claimed an amount due under the contract.<sup>14</sup> The court upheld the employee's claim. In so doing, the court stated that where one party validly elects to terminate a contract, they cannot in the same breath enforce that contract. Importantly, this statement was qualified in the following way:

'[b]ut it appears to me that this only applies to the executory portion of the contract; but where a right has accrued to the one party before the election, such right is not affected after the election. He treats the contract as at an end as from the date when he makes his election; up to that date the rights have come into existence and can be enforced.'<sup>15</sup>

*Walker's Fruit Farm* is important primarily because it marks the turning point whereby it first became possible to terminate a contract and simultaneously claim a

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<sup>13</sup> 1930 TPD 394.



performance due under the contract (i.e. *ex contractu*). With this development, the accrued rights doctrine was born.

Despite the advance made by *Walker's Fruit Farm*, the case is conceptually flawed. The flaw is that the above dictum is over inclusive in that it does not accurately describe the dividing line between cases where termination for breach operates prospectively only and cases where termination operates retrospectively as well as prospectively. In other words, it allows some claims to survive termination for breach that should not do so. The following example illustrates the point. Assume that A sells a car to B for R5,000 and that B is obliged to pay the purchase price in five monthly instalments payable on the first day of each month. Assume also that B discovered a defect in the car on the fifth day of the second month and that he had not yet paid the second instalment. B justifiably terminates the contract for A's breach and institutes a claim for restitution of the first instalment. Termination in this type of case operates retrospectively as well as prospectively. This means that both A and B must return to each other any performance received prior to termination for breach and that both parties are released from any unperformed obligations.<sup>16</sup> Accordingly, A's right to claim the second instalment does not survive termination for breach. The problem with the dictum in *Walker's Fruit Farm* is that A's right to the second instalment falls within its ambit and is hence incorrectly earmarked as a right which survives termination for breach.<sup>17</sup>

Although *Radiotronics (Pty) Ltd v Scott Lindberg & Co. Ltd*<sup>18</sup> did not have to decide the issue, the court raised doubts about the dictum in *Walker's Fruit Farm*. These doubts

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<sup>14</sup> The amount claimed was £35. Although it is not clear from the judgment how this amount was calculated, the court expressly stated that 'the claim in the present case is a claim for a payment in terms of the contract'. *Walker's Fruit Farm v Sumner* 1930 TPD 394 at 401.

<sup>15</sup> *Ibid.*

<sup>16</sup> This case is regulated by rule one and rule three. Rule two does not apply in this instance as the second instalment does not fall under the accrued rights doctrine.

<sup>17</sup> For an example of this over inclusiveness problem see *Arnold v Viljoen* 1954 (3) SA 322 (C) especially at 331.

led directly to a significant refinement of the theory in *Crest Enterprises (Pty) Ltd v Ryckloft Beleggings (Edms) Bpk*.<sup>19</sup>

### 3.2.3 *Crest Enterprises (Pty) Ltd v Ryckloft Beleggings(Edms) Bpk*

In *Crest Enterprises* a property developer wanted to develop shopping centres in order to let them out to a supermarket chain. The developer entered into a contract with Crest Enterprises in terms of which Crest Enterprises was to procure options to purchase sites for the developer. The contract provided that if an option to purchase a particular site had been obtained and the developer, for whatever reason, failed to conclude a lease with the supermarket, then the developer was obliged to cede (assign) the option to purchase the site to Crest Enterprises. On one occasion, Crest Enterprises procured an option for the developer who, having exercised the option, failed to let the site to the supermarket chain. The developer refused to transfer the property to Crest Enterprises. Crest Enterprises terminated the contract for the breach and claimed that the *land* should be ceded to it.

Holmes JA, commenting on *Walker's Fruit Farm*, said that it is clear that when Greenberg J used the word 'accrued' he meant accrued, due and enforceable.<sup>20</sup> Furthermore, Holmes JA qualified the rule in *Walker's Fruit Farm* by holding that it is confined to situations where, prior to the termination of a contract, there exists a right which is accrued, due and enforceable as a cause of action *independent of any executory part of the contract*.<sup>21</sup>

The question before the court was whether Crest Enterprises' claim to have the land ceded to them fell within the modified *Walker's Fruit Farm* rule. The court held that it

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<sup>18</sup> 1951 (1) SA 312 (C) at 320.

<sup>19</sup> 1972 (2) SA 863 (A).

<sup>20</sup> *Crest Enterprises (Pty) Ltd v Ryckloft Beleggings (Edms) Bpk* 1972 (2) SA 863 (A) at 870.

did not. This was because Crest Enterprises were only contractually entitled to the cession of the *option* to purchase the property. In order for the right to claim the land to survive termination, it was necessary for Crest Enterprises to have exercised the option to purchase the land prior to the termination for breach. As they had not done this, their case failed because their claim was not ‘accrued, due and enforceable’ prior to termination for breach.<sup>22</sup>

The case is important for two reasons. First, it stresses the importance of the first leg of the accrued rights doctrine. Secondly, the court added an important gloss to the rule in *Walker’s Fruit Farm*. Although nothing actually turned on this gloss, *Crest Enterprises* paved the way for *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd*<sup>23</sup> to introduce this gloss into South African law.<sup>24</sup>

### 3.2.4 *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd*

#### (i) *Natal Provincial Division*<sup>25</sup>

Thomas Construction, a building contractor, was engaged by an employer (a property developer) to carry out construction work. The contract provided for interim certificates to be issued periodically on the basis of which the employer was obliged to pay the amounts certified therein to the contractor. Two such certificates had been issued but were unpaid when the contract was validly terminated by the employer. The contractor

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* In fact, as the developer had already exercised the option to purchase the land by the time Crest Enterprises had terminated the contract, there was no option left for the developers to cede after termination and thus no question of this right surviving termination.

<sup>23</sup> 1986 (4) SA 510 (N) and 1988 (2) SA 546 (A).

<sup>24</sup> *Crest Enterprises* was referred to with approval in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) 1 SA (A). Nothing, however, turned on the gloss.

<sup>25</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N).

argued that their right to receive payment for certified work survived termination for breach by being an accrued contractual right.<sup>26</sup>

As the right to payment on the interim certificate was clearly accrued, due and enforceable, the court had to consider for the first time the *independent of the executory part of the contract* requirement.<sup>27</sup>

The court held that a contractor's right to payment was not independent of the executory part of the contract and accordingly did not survive termination for breach. Two reasons were given to justify the decision. First, the amounts due under the interim certificates were not intended to be compensation for a completed segment of the work but rather to supply the contractor with working capital to complete the work.<sup>28</sup> Secondly, the contractor's right to payment is counter-balanced by and dependent upon his obligation to deliver the finished product.<sup>29</sup> In elaborating on the second reason, Nienaber J states that it is implicit in a scheme which contemplates the exchange of the contract price for the completed construction work that the contractor indicates a willingness and ability to complete and fulfil its contractual obligations.<sup>30</sup>

It is clear from this analysis that the contractor's right to receive payment is not independent of the unperformed or executory part of the contract but is rather directly dependent thereon. As a result, the contractor's right to receive payment is excluded from the accrued rights doctrine and is accordingly extinguished by termination.<sup>31</sup>

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<sup>26</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 514.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 517.

<sup>29</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 516-7 and 518. The court stated that the fact that adjustments to such advances are contemplated by subsequent certificates implies that the contractants contemplated that the contract sum will eventually become payable on completion of the work.

<sup>30</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 517.

<sup>31</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 519.

The contractors appealed against Nienaber J's decision on two grounds. Firstly, they argued that the right to payment under the interim certificates was not to be regarded as reciprocal to the obligation to deliver the completed construction work but rather as compensation for a completed segment of the work. Botha JA gave this argument short shrift on the basis that it did violence to the fundamental nature of a building contract.<sup>33</sup>

The contractor's second argument was that the words 'prior to' in the phrase 'prior to the termination of the contract' in *Crest Enterprises* were of decisive importance and meant that the ascertainment of the existence of an accrued and enforceable cause of action was to be isolated entirely from the fact and consequence of termination.<sup>34</sup> According to this argument, a right survives termination for breach if there was a right to receive that performance prior to termination. If this were true, a right would survive termination simply by being accrued, due and enforceable. Botha JA rejected this argument by way of the following example. Suppose that A and B conclude a contract of sale for A's property. B is obligated to pay the purchase price of R20,000 on or before 30 September and A is obligated to transfer the property not later than 30 November. B fails to pay. On 26 November A justifiably terminates the contract for a reason other than B's failure to pay. Botha JA then notes, correctly in my view, that if the contractor's argument was correct, then A would be able to claim the R20,000 without having to transfer the property since prior to termination, A had an accrued, due and enforceable right to claim the payment.<sup>35</sup>

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<sup>32</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A).

<sup>33</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 563.

<sup>34</sup> Counsel argued that this was in fact the way the court applied the rule in the *Crest Enterprises (Pty) Ltd v Ryckloft Beleggings (Edms) Bpk* 1972 (2) SA 863 (A). See *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 564 for this argument.

<sup>35</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 564. See also Lasky, 'Terugtrede Weens Kontrakbreuk-is dit Slegs 'n Halwe Tree Terug' *Responsa Meridiana* (1980) 73 at 79.

This result is clearly undesirable and indicates that the contractor's interpretation of the dictum set out in *Crest Enterprises* - and applied by the court of first instance in *Thomas Construction* - is incorrect.<sup>36</sup>

Indeed, Botha JA held that words 'prior to the recession of the contract' only qualify the terms 'accrual of a due and enforceable right' and do not impact on the application of the 'independent of the executory part of the contract' requirement.<sup>37</sup> This must be correct since the effect of the words 'independent of the executory part of the contract' would be rendered nugatory if the contractor's second argument was upheld.

On Nienaber J's interpretation of the 'independent of the executory part of the contract' requirement, the undesirable result in the example given by Botha JA is avoided since the seller's right to claim the purchase price would not survive termination for breach. This is because B's obligation to pay purchase price is reciprocal to A's obligation to deliver the house and there can be no question of the right to claim the purchase price being independent of the unperformed or executory part of the contract, even though it was accrued, due and enforceable.<sup>38</sup>

### 3.2.5 Lessons from *Crest Enterprises* and *Thomas Construction*

#### (i) *Conceptual Clarity: Two Limbs of the Accrued Rights Doctrine*

*Crest Enterprises* and *Thomas Construction* are critically important because they clarified the formulation of the accrued rights doctrine in South African law. As a result, it is now

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<sup>36</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 564.

<sup>37</sup> *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 566.

<sup>38</sup> *Thomas Construction* has been cited with approval and applied in a number of cases. See for example *Graham NO v Williams Hunt (Pty) Ltd* 1995 (1) SA 371 (D) and *PBL Management (PTY) v Telekom SA Ltd* 2001 (2) SA 313 (T).

clear that the doctrine of accrued rights has two components. First, in order for a right to survive termination for breach it must be, prior to termination, accrued, due and enforceable. This means that the holder of this right must, prior to termination for breach, have been able to insist that the other contracting party perform that right's correlative obligation. It will be demonstrated in section 3.3.2(i) that the 'enforceable' requirement of this component requires further clarification in South African law.

Secondly, in addition to the first requirement, a right will only survive termination for breach if it is also 'independent of the executory part of the contract.' This will occur if that right and the reciprocal obligation to that right's correlative obligation form a couplet capable of standing independently of any similar unperformed couplets. Two simple examples illustrate the point. The first example is the sale of a car on instalments. On 1 January A sells B a car for R12, 000. B pays a deposit of R2,000 and agrees to pay the balance in 10 monthly instalments of R1,000. Each instalment is due on the last day of the month. By prior arrangement B had not yet paid the April instalment. On 1 May, B discovers a serious defect in the car. He terminates the contract and demands the return of his deposit and the three instalments paid. The duty to restore requires both parties to return to each other any performances received under the contract. Accordingly, A must return the deposit and the first three instalments to B and B must return the defective car to A. Does A's right to the fourth (April) instalment survive termination for breach? A's right to this instalment meets the first requirement of the accrued rights doctrine because he could have insisted, immediately prior to the termination, that B pay the April instalment. This right does not, however, meet the second requirement of the accrued rights doctrine. In this case, it is clear that A's right to the overall contract price is reciprocal to B's right to delivery of the car free from defects. It is equally clear that there is no question of A's right to the April instalment being independent of his obligation to deliver the car free from



defects. This is because B's obligation to pay April's instalment is not part of a couplet capable of being severed from a similar unperformed obligation couplet. Accordingly, the right does not survive termination for breach. It is irrelevant to this finding that B's obligation to pay the overall contract price is divided into a number of discrete payment obligations.<sup>39</sup> This is because the division of B's payment obligation does not alter the analysis of the reciprocal obligations under the contract. The point is that the divisibility of an obligation is not by itself an indicator that there are severable couplets of rights or obligations as required by the second leg of the accrued rights test.

In order for A's right to April's instalment to survive termination we would have to say that B was buying the car in eleven different segments. This would mean that when the contract was terminated, A could keep the deposit and the instalments paid and that B would be able to keep the parts of the car that corresponded to these payments. This is clearly contrary to the logical and ordinary interpretation of these types of contracts. B contracted for the entire defect free car and if he is entitled to terminate the contract, he should be entitled to return the entire car and reclaim all payments.

By way of contrast, consider a contract of lease. A lets a flat to B on 1 January for one year. B is to pay a deposit of R2000 immediately and a monthly rental of R1000. Rent is due on the last day of each month. By prior arrangement, B has not yet paid April's rent. As a result of the landlord's breach on 1 May, B terminates the contract, vacates the premises and demands the return not only of his deposit but also of the rent paid for the first three months. In addition to refusing to repay the rent received, A claims the outstanding rent for April. In this case termination does not affect A's right to claim rent for April because both requirements of the accrued rights doctrine are met. First, it is clear that immediately prior

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<sup>39</sup> *Motor Racing Enterprises v NPS (Electronics) Ltd* 1996 (4) SA 950 (A) at 961. On the issue of divisibility of contractual performances and of contracts see Van der Merwe *et al.*, *Contract: General Principles* (2003), 287-



to termination for breach A could have insisted that B pay rent for April. Secondly, B's obligation to pay rent for April and A's reciprocal obligation to provide accommodation for April are independent of the future (and by definition, unperformed) obligation couplets to pay rent and to provide accommodation. Accordingly, A's right to rent for April survives termination.<sup>40</sup> If B had not paid any rent due under the contract, then, for the same reasons, A's claim for this outstanding rent would likewise survive termination.

It follows from the above analysis that if B had paid rent for the first three months, he would not be able to claim restitution of this rent.<sup>41</sup>

(ii) *Rationale underlying Accrued Rights*

The parties' contractual intentions are the key to understanding accrued rights. When the aggrieved purchaser in the car example received the defective car, it is evident that he did not get what he bargained for. By paying in instalments it is clear that B was not agreeing to purchase part of the car with each instalment. It would, accordingly, be contrary to the parties' contractual intentions if the right to an instalment of the purchase price survived termination for breach or if the seller did not have to return all the instalments paid prior to termination (subject to the purchaser's obligation to restore the defective car). Thus the parties' contractual intentions dictate that termination operates retrospectively as well as prospectively in these circumstances.

One glaring difference between this example and the lease example is that the latter is a continuous or running contract. This is important. In the context of an employment

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292. See also *Bob's Shoe Centre v Henways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A) and *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (5) SA 494 (SCA).

<sup>40</sup> On the issue of reciprocity of mutual obligations see also *Grand Mines (Pty) Ltd v Giddey* NO 1999 (1) SA 960 (A).

<sup>41</sup> He would, however, be able to reclaim his deposit.

contract, Van Zyl J in *Maw v Grant*, made the following pertinent observation:

‘[t]his kind of contract is frequently referred to as an executory contract. I have often wondered whether it would not have been better to refer to such contracts as running contracts because during the period they run they generally create a succession of rights and obligations that are - if the contracts are carried out normally - successively extinguished by fulfilment and generally before the next set of rights and obligations arise. In a contract of this nature there are, therefore, executed portions of the contract and executory portions of the contract.’<sup>42</sup>

This indicates that in some partially performed contracts it is possible to say that each party received precisely what they had bargained for in respect of the part performance. If both parties have performed their side of the severable obligation couplet, then the fact that both parties have received what they bargained for justifies excluding restitution. If only one party has performed their side of the obligation couplet, then the same rationale explains why the performer’s right to claim the reciprocal counter-performance survives termination for breach.

When termination takes place in the middle of an obligation couplet, say, on the 15<sup>th</sup> of a particular month in a lease contract, then it is no longer possible to say that the tenant has received what he bargained for in that month. Accordingly, the tenant has the right to restitution of rent paid for that month. Logically, if rent had not yet been paid, the landlord would not be able to claim that his right to this rent survived termination as an accrued right.

### (iii) *Doctrinal Basis of Accrued Rights*

Given that the survival of an accrued right is rationalised on the basis of the parties’ contractual intentions, it is clear that these rights survive termination as enforceable primary

contractual rights.

It is necessary to stress this point as Sally Hutton has recently argued that the survival of accrued rights is best explained by the principles of unjustified enrichment.<sup>43</sup> According to Hutton, there are two possible constructions of the *causa* for a contractual performance for the purpose of determining whether the *sine causa* requirement of an enrichment action is met in South African law. According to the first construction, a party makes a performance because of a valid contractual obligation to do so. As termination does not extinguish the correlative primary performance obligations of rights that survive termination, this means that termination does not eliminate the *causa* for these performances. Accordingly, if that performance had been rendered, then the retention of that benefit would be justified according to the principles of unjustified enrichment.<sup>44</sup>

The second construction of the *causa* sees the purpose of making a contractual performance as the assumption, relating to the future, that the contract will be duly completed (i.e. that proper counter-performance will be forthcoming). When a right survives termination for breach, it is clear that the assumption that counter-performance will be duly forthcoming has not failed. The retention of this benefit will thus be justified according to the principles of unjustified enrichment.

This analysis demonstrates that as a matter of unjustified enrichment doctrine, it is possible to rationalise accrued rights according to the principles of unjustified enrichment. In my view, the law of unjustified enrichment does no useful work explaining accrued rights. Accrued rights are primary contractual rights and unjustified enrichment is superfluous for the same reason that it is unnecessary to turn to the law of

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<sup>42</sup> 1966 (4) SA 83 (C) at 87.

<sup>43</sup> Hutton, 'Restitution after Breach of Contract: Rethinking the Conventional Jurisprudence' (1997) *AJ* 201 at 218.

<sup>44</sup> Hutton, (1997) *AJ* 218.

unjustified enrichment to explain why a recipient of a contractual performance under a valid and subsisting contract can retain that performance.

### 3.2.6 Residual Difficulties

After *Thomas Construction*, accrued rights in South African law reached conceptual maturity. Despite this, subsequent cases have demonstrated that some residual difficulties remain in applying this doctrine.

(i) *Frost Building CC v Swift Housing (Pty) Ltd*<sup>45</sup>

*Frost Building*, like *Thomas Construction*, involved a building contract with the provision for progress payments by way of interim certificates. Certain sums had become due under these certificates. Unlike *Thomas Construction*, however, it was the employer (developer) rather than the contractor who had breached the contract. The contractor validly terminated the contract for this breach and applied to have the employer liquidated. In opposing the application the developers argued, relying on *Thomas Construction*, that although the certified progress payments had become accrued, due and enforceable, they were not independent of the executory part of the contract and as a result, did not survive termination for breach. If this was true, these payment obligations could not be used to support the liquidation application.<sup>46</sup> De Klerk J rejected the employer's argument and held that the amounts due on the interim certificates did survive termination for breach and could be used to support the liquidation application.

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<sup>45</sup> 1991 (3) SA 318 (W).

<sup>46</sup> *Frost Building CC v Swift Housing (Pty) Ltd* 1991 (3) SA 318 (W) at 320.

De Klerk J considered that the *exceptio non adimpleti contractus* (or some remnant thereof or something akin to it) was the true basis of the decision in *Thomas Construction* not to allow the breaching contractor to claim the sums due under the interim certificates.<sup>47</sup> According to De Klerk J it followed logically that while the defence was successful in *Thomas Construction* where the contractor was in breach, this defence did not survive termination where the employer was in breach.<sup>48</sup>

De Klerk J probably turned to the *exceptio non adimpleti contractus* because reciprocity lies at the heart of this defence in a similar way that it underpins the second limb of the accrued rights doctrine. *Frost Building* rightly highlights that the decisions on the *exceptio* can be of assistance in the potentially troublesome task of working out which obligations in a contractual relationship are reciprocal to each other.

We must, however, tread cautiously. The *exceptio* allows the aggrieved party to repel a claim for performance from the contract breaker if the reciprocal obligation due by the latter has not been performed in full. The aim of the defence is to put pressure on the contract breaker to perform his side of the bargain. Clearly the defence only has currency while the contract is on-going. Once the contract has been terminated, however, the basis of the defence disappears as it is clear at that moment that the aggrieved party no longer wants performance from the contract breaker. This makes De Klerk J's interpretation of *Thomas Construction* theoretically problematic as it is doctrinally inconsistent to allow the aggrieved party to terminate the contract and simultaneously raise the *exceptio*.<sup>49</sup>

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<sup>47</sup> *Frost Building CC v Swift Housing (Pty) Ltd* 1991 (3) SA 318 (W) at 321.

<sup>48</sup> *Ibid.*

<sup>49</sup> In addition to this problem of principle, there is also no authority for using the *exceptio* in this context. Van der Merwe *et al.* argue that *Frost Building* incorrectly used the *exceptio non adimpleti contractus* to explain *Thomas Construction*. This is because, the authors argue, 'the simple truth is that an obligation extinguished by termination cannot be enforced.' Van der Merwe *et al.*, *Contract: General Principles* (2003), 376 n161 and 378 n175.

- (ii) *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd; Shelfaerie Property Holdings CC v Midrand Shopping Centre (Pty) Ltd*<sup>50</sup>

The question before the court was once again whether a contractor's right to enforce payment in terms of an architect's interim certificate survived termination for breach.<sup>51</sup> The facts resembled *Frost Building* in that the employer was in breach. There was nothing to distinguish the contract in *Shelagatha Property Investments* from the contract in either *Frost Building* or *Thomas Construction*.<sup>52</sup>

In contradistinction to *Thomas Construction*, the court held that the contractor's right to payment under the interim certificates was independent of the executory part of the contract and therefore survived termination for breach. The court placed great store in the fact that the employer was the party who had breached the contract.<sup>53</sup> This was said to be important because in cases where the contractor is in breach, his right to remuneration is uncertain and can only be determined after a third party has completed the work. This was said to contrast with cases where the employer is in breach since the aggrieved contractor is released from his obligation to finish the work and the employer has no further claim against him in this regard.<sup>54</sup> In order to justify this decision in terms of accrued rights, the court identified the reciprocal obligations as follows: the employer's obligation to make payment under the interim certificates was reciprocal not only to the contractor's obligation to carry out the work but also to the contractor's willingness and ability to complete the work. There are two areas of concern with the court's reasoning.

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<sup>50</sup> 1995 (3) SA 187 (A).

<sup>51</sup> *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd; Shelfaerie Property Holdings CC v Midrand Shopping Centre (Pty) Ltd* 1995 (3) SA 187 (A) at 189.

<sup>52</sup> *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd* 1995 (3) SA 187 (A) at 193 and 196.

<sup>53</sup> *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd* 1995 (3) SA 187 (A) at 195.

<sup>54</sup> In short, the aggrieved contractor's right to remuneration is not conditional upon further performance under the contract. *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd* 1995 (3) SA 187 (A) at 195.

The first is the court's view that the contractor's right to payment is dependent on which party breached the contract. This is problematic because termination releases both contracting parties from future unperformed obligations irrespective of which party breached the contract.<sup>55</sup> The only time the certainty of the contractor's right to receive payment would depend on who was in breach is when the contract *had not yet been terminated*. This is because of the availability of the *exceptio non adimpleti contractus*. As stated above, this defence ought to play no direct part in determining the survival of accrued rights.

The second area of concern is the court's analysis of the reciprocal obligations in this contract. In the court's view, the right to receive payment under the interim certificates was reciprocal not only to the contractor carrying out the requisite work but also to his ability and willingness to complete the entire work. The latter comes from Nienaber J's analysis in *Thomas Construction*. In that case the contractor's unwillingness and inability to complete the work precluded his right to receive payment under the certificates from surviving termination for breach. This is not true in cases like *Shelagatha Property Investments* where the employer is in breach as the contractor's willingness and ability to complete the work is unaffected by the breach. The question whether this is the correct approach turns on whether it is desirable to reach a different conclusion depending on which party breached the contract. In my view, the outcome in *Thomas Construction* is preferable for two reasons. Firstly, if the building contract was viewed as analogous to a contract of lease in the sense that the delivery of a completed segment of the work is reciprocal to the right to receive a corresponding part of the purchase price, then this would have negative consequences for the employer in cases where the contractor was in breach. It is not unlikely that the contractor might have carried out inferior work and/or was facing

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<sup>55</sup> For another criticism of this part of the court's reasoning see Van der Merwe *et al.*, *Contract: General Principles* (2003), 381-2. See also Winsen J in *Arnold v Viljoen* 1954 (3) SA 322 (C) at 331 where it was held that

insolvency. If the work turned out to be defective despite the interim certification, then it would be unfair to the employer if his damages claim was offset by the contractually agreed upon interim payment.<sup>56</sup> This is because the contractor would, all things being equal, recover less under the duty to restore than the contractually agreed upon interim payment as the latter presupposes proper performance. The unfairness would be felt in cases where the contractor was facing insolvency. In these cases the developer would be left with a larger unsecured claim if the contractor was allowed set off the amount due under an interim certificate against the developer's damages claim than would be the case if the contractor was obligated to institute an action under the duty to restore. Accordingly, the preferable solution is to insist that the contractor institute an action under the duty to restore against the developer to recover for his part-performance.

Secondly as regards the likelihood of receiving payment, it makes no difference from the contractor's point of reference whether his claim against the breaching developer is packaged as an accrued contractual right or as a claim for part performance under the duty to restore (coupled, where appropriate, with a claim for contractual damages). This is because both will ultimately depend on the developer's ability to settle the claim.

The above analysis leads to the conclusion that *Frost Building* and *Shelagatha Property Investments* ought not to be followed in future cases.

### 3.2.7 Lessons from South African Law

The story of accrued rights in South African law has been long and tortuous. The

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<sup>56</sup> I cannot see how that fact that the respondent is the injured party alters ... the principle that obligations accrued up to the date of rescission must be fulfilled.'

<sup>56</sup> The cases make it plain that the amounts paid under interim certificates are subject to adjustment based on information that subsequently comes to light. See for example *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 517.



starting point was that a contractual right could not survive termination for breach. It came to be recognised, however, that in some circumstances contractual rights can survive termination for breach. The initial attempt by *Walker's Fruit Farm* to articulate a rule which indicates when a contractual right survives termination was incomplete. Subsequently, *Thomas Construction* (confirming the *obiter* in *Crest Enterprises*) settled matters by holding that a right to a contractual performance survives termination for breach if it is, prior to termination, accrued, due and enforceable and independent of the executory part of the contract.

Two limbs make up this doctrine. First, in order to survive termination a right must, at the time of termination, be accrued, due and enforceable. This means that the holder of this right must, at the time of termination, have been able to insist that the other contracting party perform that right's correlative obligation.

Secondly, the right must, in addition, be 'independent of the executory part of the contract.' This requirement is best explained by the twin concepts of reciprocity and severability. For a right to survive termination for breach it must be counter-balanced by a reciprocal obligation (i.e. an obligation that is reciprocal to that right's correlative obligation) that is capable of being severed from other unperformed reciprocal obligation couplets.

Although this law is clear, it was demonstrated that it can be problematic to work out precisely which obligations are reciprocal to each other in any particular contract. As contractual arrangements vary widely, it is not sensible to search for a comprehensive list of guidelines which articulate when a right is independent of the executory part of the contract. It is possible, however, to give some guidance. The starting point is the parties' contractual intentions.<sup>57</sup> Throughout this chapter a sale of the car and a lease were used as paradigm examples to illustrate the difference between cases in which a right was extinguished by

termination and cases in which the right survived termination. One glaring difference between the two contracts is that the lease is a continuous or running contract whereas the sale is not. The lease contract creates a series of obligations that arise successively on a monthly basis. The rent is paid on a monthly basis in exchange for the provision of accommodation for the same period. In contradistinction, the purchaser of a car intends to purchase the complete car (free from defects) in exchange for the entire purchase price. This intention to purchase complete ownership of the car (as opposed to individual segments of that car) is not altered by the fact that the purchaser's payment obligation might be divided into several instalments. The lesson to be gleaned from these differences is that the *nature* or *type* of contract is an important indicator of whether the parties intend the obligations arising under the contract to be broken down into severable obligation couplets or whether the parties intend the entire performance on one side to be reciprocal to the entire performance on the other side.

Although a right will survive termination more easily when a contract contains continuous obligations, this is not a necessary condition for the survival of an accrued right.<sup>58</sup> It will, however, be useful for the courts to ask whether the case before them is analogous to the lease example or to the sale of the car example.

The analysis of *Shelagatha Property Investments* revealed it can be helpful – in absence of a clear contractual provision – to enquire whether policy factors favour a particular conclusion regarding the reciprocity and severability of obligations. In this regard it is important to test whether the survival of an accrued right would negatively prejudice the party not in breach of contract. Analysis demonstrated that this can become an issue in the case of insolvency.

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<sup>57</sup> See *BK Tooling (Edms) Bpk v Scope Precision Engineering* 1979 (1) SA 391 (A) at 418 (translation) for a general discussion about the starting point being a matter of contractual interpretation.

### 3.3 Scots Law

Given that neither Roman law nor the Scottish institutional writers had developed a general right to terminate a contract for breach, much less a coherent theory detailing the effects of termination for breach, it is hardly surprising to find that these systems did not deal with accrued rights. Unlike modern South African law, however, modern Scots law has not gone on to formulate a theoretically satisfactory rule which articulates when contractual rights survive termination for breach. As a result, the story of accrued rights in Scots law cannot be told by explaining the development of one particular rule. Instead, it is necessary to consider the various types of cases that have had an impact on this doctrine. It will be demonstrated that many problems encountered in Scots law in this area will be overcome by adopting South African law's formulation of the accrued rights doctrine.

In order to explain accrued rights in Scots law and defend my argument, I will divide the cases into three groups. The first group of cases demonstrate that there is authority on the back of which Scots law can adopt South African law's formulation of accrued rights. The second group of cases focuses on the principle of mutuality. These cases will demonstrate (a) that Scots law has run into trouble by applying a rule which prevents a party in breach from suing for performance on the contract in all circumstances and (b) that Scots law has not properly understood the relationship between the right of retention, the duty to restore and the doctrine of accrued rights. The third group of cases demonstrates that Scots law has inappropriately used the distinction between an advance payment of the contract price and an advance payment against a future obligation to pay the contract price to explain cases that ought to be explained either on the basis of accrued

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<sup>58</sup> For a statement that appears categorical in this regard see Harker, 'Damages for Breach of Contract:

rights or on the basis of the forfeiture of a contractual payment.

### 3.3.1 A Path to Doctrinal Clarity

There are a number of cases in Scots law which indicate that there is some degree of similarity between the accrued rights doctrines in the respective systems. In my view, the underlying reasoning in these cases demonstrates that it would be doctrinally consistent for Scots law to adopt South African law's formulation of accrued rights. Although these cases all reached the correct results, the South African formulation provides a better rationalisation of these cases. More importantly, by adopting this formulation Scots law will be able to rectify the deeper problems encountered in the two other groups of cases.

#### (i) *Gibson v McNaughton*<sup>59</sup>

This case involved an employment contract in terms of which an employee was paid wages on a weekly basis. The contract required the employee to give one month's notice in order to terminate the contract. In breach of this clause, the employee left his employment two weeks into the notice period. The question was whether the employee could, nevertheless, claim wages for this two week period.<sup>60</sup> Although there is little by way of the theoretical justification, the court upheld the employee's claim.<sup>61</sup>

Two points are noteworthy. First, this case is cited by Gloag as authority for the proposition that a material breach of contract does not allow the party who terminated the

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Negative or Positive Interesse' (1994) 111 *SALJ* 5 at 11.

<sup>59</sup> (1861) 23 D 358.

<sup>60</sup> *Gibson v McNaughton* (1861) 23 D 358 at 361.

<sup>61</sup> *Gibson v McNaughton* (1861) 23 D 358 at 362-3.

contract to escape liability for debts already accrued.<sup>62</sup> Although Gloag correctly identifies that some contractual rights survive termination for breach, he is incorrect to limit these to claims by a contract breaker. Accrued rights can survive termination for breach irrespective of which party is the holder of that right.

Secondly, this case is identical to the paradigmatic lease example.<sup>63</sup> Accordingly, the real reason the claim survived termination is because it formed part of an obligation couplet that was independent of the unperformed obligation couplets and thus independent of the executory part of the contract.

(ii) *Turnbull v McLean*<sup>64</sup>

In this case a coal seller agreed to supply coal to the purchaser on a monthly basis against a monthly payment of the price. As a result of alleged minor breaches by the seller (an allegation which turned out to be unfounded), the purchasers refused to pay for coal supplied during November. In response, the seller refused to supply coal in December and terminated the contract for the purchasers' repudiation.<sup>65</sup> The purchasers argued that the obligation to deliver coal in December was altogether separate from the obligation to pay for coal supplied in November.<sup>66</sup> The court rejected the purchasers' argument and found that the seller was justified in terminating the contract for the purchasers' refusal to pay for coal received in November. Furthermore, the court held that the sellers could enforce the purchasers' payment obligation for November.<sup>67</sup> In justifying its decision, the court set out

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<sup>62</sup> Gloag, *The Law of Contract* (1929), 622.

<sup>63</sup> For another example of a similar type of case in Scots law see *Thorneloe v McDonald & Co.* (1892) 29 SLR 1096. For a commentary on this case see McBryde, 'Remedies for Breach of Contract' (1996) 1 *Edin LR* 43 at 66-7.

<sup>64</sup> (1874) 1 R 730.

<sup>65</sup> *Turnbull v McLean* (1874) 1 R 730 at 736-7.

<sup>66</sup> *Turnbull v McLean* (1874) 1 R 730 at 737-8.

<sup>67</sup> *Turnbull v McLean* (1874) 1 R 730 at 737-9. The conclusion is supported by McBryde, (1996) 1 *Edin LR* 65.

three principles which were said to govern mutual contracts in Scots law. The first two are applicable to the cases in the following section and the third is as follows:

‘[w]here one party has refused to perform his part of the contract in any material respect the other is entitled to insist on implement, claiming damages for the breach, or to rescind [terminate] the contract altogether - except in so far as it has been performed.’<sup>68</sup>

This dictum refers to two conceptually independent and mutually exclusive choices available to the aggrieved party after a breach. Importantly, the court qualified the aggrieved party’s right to terminate the contract with the words ‘except in so far as it has been performed.’ By this it is meant that termination does not affect that part of the contract which has been performed. Analysis in this chapter and the previous chapter established that termination for breach does not affect the following: (a) rights that fall under the accrued rights doctrine and/or (b) the right to retain a contractual performance if the right to claim the corresponding performance from the other party falls directly under the accrued rights doctrine or would have fallen under that doctrine but for the fact that it has already been performed. The problem with the court’s dictum is that it does not accurately refer to either of the above. The upshot is that the dictum does not provide an accurate mechanism for determining which rights survive termination for breach and by necessary implication, which performances must be restored. It is clear that a performance rendered prior to termination cannot be retained simply by virtue of being performed. If this were true without qualification, the purchaser of the defective car on instalments would not be able to reclaim payments made prior to termination. Accordingly, the dictum is over-inclusive in expressing the accrued rights doctrine. A similar problem was encountered in South African law immediately prior to the addition of the ‘independent of the executory

part of the contract' requirement.<sup>69</sup>

Although the dictum in *Turnbull* is conceptually flawed, the reasoning in the case supports an alternative rationalisation of accrued rights. The court expressly identified the reciprocal obligations in the contract as the obligation to supply coal on a monthly basis and the obligation to pay for this coal at the end of that month.<sup>70</sup> The essence of the court's final decision was the seller's right to receive payment for supplying coal in November survived termination for breach because it was independent of the obligation to supply coal in December. If this case was decided under the current South African law, the court would have said that the right to payment in November survived termination for breach because it was, immediately prior to termination, accrued, due and enforceable and independent of the executory part of the contract. The upshot is that *Turnbull* provides cogent authority on the back of which Scots law can adopt South African law's formulation of the accrued rights doctrine.

(iii) *Lloyds Bank plc v Bamberger*<sup>71</sup>

*Lloyds Bank plc* is the leading modern Scottish case on accrued rights. In this case, the seller of a house terminated the contract as a result of the purchasers' failure to pay the purchase price timeously. The seller claimed that the contract entitled it to interest on the purchase price from the time the contract was concluded until it was terminated. They argued that the right to this interest had accrued prior to termination for breach and hence survived termination. In refusing the seller's claim the court relied on the following principle from English law:

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<sup>68</sup> *Turnbull v McLean* (1874) 1 R 730 at 738.

<sup>69</sup> See section 3.2.2.

<sup>70</sup> *Turnbull v McLean* (1874) 1 R 730 at 736.

‘[a]lthough rescission [termination] absolves both parties from future performances of their primary obligations under the contract, they are not absolved from primary obligations already due at the time of rescission. Thus claims for debts or arrears of money unconditionally due under the contract may still be enforced. Examples are arrears of rent due under the lease, or instalments of price due prior to rescission.’<sup>72</sup>

Once again, this dictum suffers from the same over-inclusiveness problem encountered in the preceding subsection. This is evident from the reference to the survival of the right to claim an instalment of the purchase price due before termination. The defective car example made it clear that the right to claim part of the purchase price does not always survive termination.<sup>73</sup>

Although the dictum set out in *Lloyds Bank plc* is conceptually flawed, the underlying reasoning supports an alternative rationalisation of accrued rights. The court held that the right to claim interest did not survive termination for breach because this interest was only payable in the event that the purchase price was paid (or was payable) after the due date. As termination extinguished the purchasers’ obligation to pay the purchase price, the court held that the interest could not be claimed.<sup>74</sup> It is clear that the reciprocal obligations in this case are, on the one hand, the obligation to pay the purchase price and, on the other, the obligation to transfer the house. In South African law, it is clear that the right to claim the purchase price would not survive termination for breach because it is not independent of

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<sup>71</sup> 1993 SC 570.

<sup>72</sup> *Lloyds Bank plc v Bamberger* 1993 SC 570 at 573.

<sup>73</sup> The court relied on the English case of *Hyundai Heavy Industries Co. Ltd v Papadopoulos* [1980] 1 WLR 1129 HL for this proposition. The case involved a shipbuilding contract in which the purchase price was payable in instalments. The court held that an instalment due before termination survived termination for the purchaser’s breach. This resulted in the purchaser forfeiting the instalment. The case suffers from English law’s adherence to the theory that termination for breach operates prospectively only and from the fact that their doctrine of accrued rights does not possess a mechanism which incorporates and delimits the scope of the reciprocity and severability requirements embedded in the second leg of the accrued rights doctrine in South African law. MacQueen has argued that *Lloyds Bank plc* rejects the extreme interpretation of *Hyundai* that rights arising before termination survive termination for breach because they are due and because termination is prospective in effect. See MacQueen, ‘Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective’ in Rose (ed), *Failure of Contracts: Contractual Restitutionary and Proprietary Consequences* (1997), 199 at 218.



the executory part of the contract. If the right to claim interest only arises when the purchase price is paid, then it follows logically that this right is also not independent of the executory part of the contract and accordingly, does not survive termination for breach.<sup>75</sup>

The above analysis is consistent with MacQueen's view that *Lloyds Bank plc* indicates that the Scottish courts will hold that a right is accrued, and hence survives termination for breach, if it has been met by the anticipated counter-performance. This, he argues, counteracts the legitimate fear that finding a right to have accrued simply because a performance is due will lead to an unjustifiable forfeiture of that performance.<sup>76</sup> Interestingly, this concern was raised by the South African courts prior to the introduction of the 'independent of the executory part of the contract' requirement.<sup>77</sup> This problem is eliminated once the accrued rights doctrine contains this requirement. This will ensure that all rights that survive termination for breach will do so because the obligation that is reciprocal to that right's correlative obligation has been performed according to terms of the contract.

#### (iv) *Lump Sum and Measure and Value Construction Contracts*

Lump sum contracts are analogous to the sale of the car example in that the obligation to deliver the finished product is reciprocal to the right to receive the full purchase price. Measure and value contracts are analogous to the lease example in that the right to receive respective parts of the purchase price is reciprocal to the obligation to

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<sup>74</sup> *Lloyds Bank plc v Bamberger* 1993 SC 570 at 574.

<sup>75</sup> Another – perhaps more technically correct – way of arriving at the same result is as follows: if interest was only payable once the purchase price had been paid, then the fact that the purchase price had not been paid before termination means that the right to claim interest was not, prior to termination, 'accrued, due and enforceable'.

<sup>76</sup> MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts* (1997), 217.

<sup>77</sup> *Lehmbecker's Earthmoving and Excavators v Incorporated General Insurance* 1984 (3) SA 500 (A) at 522.

deliver completed segments of the building work (usually subject to architectural certification).<sup>78</sup>

In my view, the South African formulation of the accrued rights doctrine explains why the right to receive the contract price for the completed parts of measure and value contracts survives termination for breach. This contention is supported by the following dictum explaining the nature of measure and value contracts:

‘[i]n such a contract the covenants for work are independent of each other in this sense, that a builder who has completed a number of items conform to contract and has handed over the works to the building owner, and has obtained the final certificates of the architect and measurers, is not disentitled to recover in respect of these items on the ground that on other items he has failed to conform with the contractual conditions.’<sup>79</sup>

The point that emerges from the analysis of the cases in this section and the preceding section is that there are a number of key Scottish cases which are capable of being rationalised on the basis of South African law’s formulation of the accrued rights doctrine. This provides the authority on the back of which Scots law can adopt this formulation.

### 3.3.2 Accrued Rights and the Mutuality Principle

The mutuality principle underpins the rule in Scots law that one party is entitled to withhold a contractual performance until such time as the other contracting party has

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<sup>78</sup> As stated in section 3.2.5(i), the fact that the purchase price is payable in instalments (i.e divisible) does not turn a lump sum contract into a measure and value contract.

<sup>79</sup> *Forrest v The Scottish County Investment Co. Ltd* 1916 SC (HL) 28 at 36. See also Lord Skerrington’s comments in the Inner House: *Forrest v The Scottish County Investment Co. Ltd* 1915 SC 115 at 134-5. For a full discussion of these two cases see MacQueen, ‘Unjustified Enrichment and Breach of Contract’ (1994) JR 137 at 152-9. See also *Cutter Mill Restaurant v Hogg* 1996 SCLR 182 (Sh Ct) discussed briefly by Hogg, *Obligations* (2003), para. 4.112.

rendered proper performance.<sup>80</sup> It has been established that this rule only applies to obligations that are exact counterparts of each other.<sup>81</sup> This right to withhold a contractual performance is known as the right of retention in Scots law and is equivalent to the *exceptio non adimpleti contractus* in South African law. Scots law has encountered two problems in this area that have had an impact on the accrued rights doctrine. First, Scots law has failed to clarify the relationship between the right of retention, the effect of termination for breach and the accrued rights doctrine. Secondly, Scots law has sometimes interpreted the principle of mutuality to mean that the contract breaker cannot sue on the contract in any circumstances. The impact of these two problems on the accrued rights doctrine in Scots law will be illustrated with reference to *Graham v United Turkey Red*<sup>82</sup> and *Bank of East Asia Ltd v Scottish Enterprise*.<sup>83</sup>

(i) *Graham v United Turkey Red*

In this case Graham was engaged as an agent to distribute United Turkey Red's products. The contract ran from 1914 to 1917. It was agreed that the agent would not act for other manufacturers during this period. The agent breached that clause from 1916 until the time the contract was (unjustifiably) terminated by the agents in 1917. Although commission was to be paid monthly, some commission earned during the contract period had not yet been paid when the contract was terminated. The court held that the agents were not entitled to claim any unpaid commission earned whilst they were in breach (1916-

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<sup>80</sup> *Turnbull v McLean* (1874) 1 R 730 at 70. For a general discussion of this principle see McBryde, (1996) 1 *Edin LR* 64-9.

<sup>81</sup> *Redpath Dorman Long Ltd v Cummings Engine Co. Ltd* 1981 SC 370 and *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 (HL). For a recent consideration of the mutuality principle see *Hoult v Turpie* 2003 SCLR 577 at 581-2. This case is discussed briefly in section 3.3.2(i) below.

<sup>82</sup> *Graham v United Turkey Red* 1922 SC 533.

<sup>83</sup> 1997 SLT 1213 (HL).

1917).<sup>84</sup> The court relied on the second principle from *Turnbull v McLean* which stated that the failure of one party to perform any material part of the contract will prevent him from suing the other for performance. The court interpreted this principle strictly to mean that a party in breach is prevented from suing on the contract for performance in any circumstances. This meant that the agent forfeited the unpaid commission earned while he was in breach.<sup>85</sup>

This case raises a number of issues for the doctrine of accrued rights. Firstly, it was pointed out in section 3.2.6(i) that it is theoretically unsound for the right of retention (the *exceptio non adimpleti contractus*) to play any direct role after a contract has been terminated for breach. This is because the aim underlying the right of retention, which is to put pressure on the contract breaker to perform his side of the bargain, loses its currency after a contract is terminated. This means that the second principle enunciated in *Turnbull* is only applicable prior to termination for breach.

The theoretical defect in *Graham v UTR* is reflected in the fact that it is incompatible with the rules set out in chapter two.<sup>86</sup> According to the scheme proposed in the rules, the economic imbalances after termination for breach are regulated exclusively by accrued rights, restitution and the duty to pay contractual damages.<sup>87</sup> In this light, *Graham v UTR* ought to be resolved by asking first whether the agent's right to the unpaid commission earned while he was in breach falls under the accrued rights doctrine. There is little difficulty identifying the reciprocal obligations in this case. It was stipulated that the principal was under an obligation to pay the agent commission on a monthly basis and that the agent was

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<sup>84</sup> For the facts and the ultimate decision see *Graham v United Turkey Red* 1922 SC 533 at 540-3.

<sup>85</sup> There was, however, some *obiter* suggestion that the principal might be liable to the agent in unjustified enrichment to the extent that he had benefited from the agent's services. *Graham v United Turkey Red* 1922 SC 533 at 550. From an accrued rights perspective, the fact that the agent could retain some of the commission earned during the period in breach indicates that the decision is unprincipled. See McBryde, (1996) 1 *Edin LR* 68.

<sup>86</sup> For a discussion of further problems with this case see McBryde, (1996) 1 *Edin LR* 65.

under a reciprocal obligation to perform according to the terms of the contract on a monthly basis.<sup>88</sup> In order for the agent's right to claim the unpaid commission to survive termination, it would need to be, immediately prior to termination, 'accrued, due and enforceable'. In this instance enforceability is the key. For the period during which the agent was in breach, the principal would have been able to resist the agent's claim for commission by exercising the right of retention. If 'enforceable' is taken to mean 'can actually be claimed,' the agent's right to the unpaid commission would not meet the requirement of the first leg of accrued rights. On this interpretation, a claim will not be 'enforceable' (and hence fall outside the doctrine of accrued rights) whenever the aggrieved party could, immediately prior to termination, have raised the right of retention. Assuming that the contract does not provide for complete forfeiture, then there are two ways to compensate the agent for work carried out whilst he was in breach. First, the 'enforceable' requirement could be given an interpretation which does not entail a correlation between the right falling within the accrued rights doctrine and the availability of the right of retention. The problem is that the aggrieved party would then be left with an incomplete performance for which he was now contractually liable. This is ameliorated by the aggrieved party's right to set off the contract breaker's contractual claim with a claim for damages.<sup>89</sup>

Secondly, if the contract breaker's contractual claim is excluded from the doctrine of accrued rights, then the rules dictate that he will have a restitution claim against the aggrieved party.<sup>90</sup>

In my view, the second option is preferable. The first solution runs counter to the

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<sup>87</sup> This argument carries with it the implicit claim that Scots law ought to abandon the rule that a party in breach cannot sue on the contract. For a similar call see McBryde, (1996) 1 *Edin LR* 68.

<sup>88</sup> *Graham v United Turkey Red* 1922 SC 533 at 548.

<sup>89</sup> *Redpath Dorman Long Ltd v Cummings Engine Co. Ltd* 1981 SC 370.

<sup>90</sup> This clarifies an issue which, according to MacQueen, has not received much attention in Scots law: the relationship between the duty to restore and the doctrine of accrued rights. MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts* (1997), 219. This relationship is articulated in rule three and rule four set out in section 2.2.3.

underlying rationale of accrued rights because it is not possible to say that (for at least part of the contract) each party received what they bargained for. Accordingly, the contract breaker ought to institute a restitution claim against the aggrieved party to recover for work rendered.<sup>91</sup>

Two points emerge from the above analysis. First, important work is done by the inclusion of 'enforceable' in the first limb of the accrued rights test. The relationship between accrued rights and the right of retention is encapsulated in the following general principle: if the aggrieved party could have raised the right of retention (or the *exceptio non adimpleti contractus*) against the contract breaker immediately prior to termination, then the right to the performance repelled by this defence will not fall under the accrued rights doctrine.

This principle is unaffected by *Hoult v Turpie* where Lord Drummond Young held that the requirement that obligations must be contemporaneous with each other should not be interpreted strictly so as to curtail the right of retention by breaking up the essential unity of the contract.<sup>92</sup> According to Lord Drummond Young, *Turnbull v Mclean* is authority for the proposition that a seller's obligation to deliver an instalment of goods due under the contract is the counterpart of the purchaser's obligation to pay for a previous instalment.<sup>93</sup> Thus the seller in *Turnbull* was entitled to withhold delivery of coal due in December as a result of the purchaser's failure to pay for coal supplied in November. The principle stated above holds true because the seller was repelling the purchaser's right to demand delivery of coal at the beginning of December and this right to performance clearly does not survive

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<sup>91</sup> Although this second solution is preferable, it is sometimes possible to achieve satisfactory results with the first solution. For example, a satisfactory result would have been reached in *Graham v United Turkey Red* 1922 SC 533 if the agent's right to commission survived termination for breach subject to the principal's right to counterclaim for damages. This is probably true for all cases in which the breach can only be rectified by a damages claim and the damages claim is less than the value of an accrued rights claim.

<sup>92</sup> *Hoult v Turpie* 2003 SCLR 577 at 581.

<sup>93</sup> *Hoult v Turpie* 2003 SCLR 577 at 585.

termination. Importantly, the principle does not affect the conclusion that the seller's right to demand the outstanding payment for coal supplied in November survives termination for breach.

Secondly, analysis in this section establishes that Scots law ought to jettison the rule that a party in breach cannot sue for contractual performance in any circumstances.<sup>94</sup> A proper application of the theoretically sound rules regulating the right of retention, the accrued rights doctrine, and right to claim restitution after termination for breach will ensure that just results are reached in all cases. The point is that these doctrines are sharper instruments to ensure these just results than the more blunt and indiscriminate rule that a party in breach is prevented from suing on the contract in any circumstance.

(ii) *Bank of East Asia Ltd v Scottish Enterprise*<sup>95</sup>

The facts of *Bank of East Asia* were as follows. The Scottish Development Agency (SDA), the predecessor of Scottish Enterprise, contracted with Stanley Miller (Scotland) Ltd (SM) for construction works. Prior to the commencement of works, it was agreed between the parties that SM would arrange finance to meet ongoing expenses. SM arranged this finance through the Bank of East Asia to whom they duly assigned all their rights to payment from the SDA. An instalment of £416,000 had been due on 15 May 1990. SM went into receivership on 29 May 1990. On that date the construction work incomplete and defective. The losses suffered by the SDA as at 15 May were £168,000. Further losses were incurred after 29 May 1990 as a result of SM's breaches.<sup>96</sup> The Bank sued the SDA for the instalment due on 15 May. The SDA sought to exercise their right of retention over the obligation to pay the £418,000 due on 15 May 1990 as a result of breaches that had taken

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<sup>94</sup> This rule is clearly incompatible with the accrued rights doctrine.

<sup>95</sup> 1997 SLT 1213 (HL).



place both prior to and after that date. The House of Lords held that whilst there could be retention of funds in respect of breaches that had occurred up until 15 May 1990, the SDA could not retain any of the £418,000 for breaches occurring after that date. It was agreed between the parties that the SDA could retain the £168,000, being the amount of damages required to compensate them for their losses until 15 May 1990. The difference was to be paid to the Bank and the SDA was left with a damages claim against SM.<sup>97</sup>

The essence of the court's decision was that the right of retention can only be used to repel defective performances for 'contemporaneous' or 'concurrent' obligations.<sup>98</sup> The court relied on the principle from *Turnbull v McLean* which stated that failure to perform any material or substantial part of the contract by one party will prevent that party from suing the other party for performance. The court stated that this principle only applies to that part of the contract which is reciprocal to the obligation not being performed.<sup>99</sup>

Although the court does not make this clear, the SDA, when they engaged another

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<sup>96</sup> This loss was caused by the SDA having to (i) remedy the defects in the existing work; (ii) engage a more expensive contractor to complete the defective work; and (iii) delay letting the units.

<sup>97</sup> For the facts and ultimate decision see respectively *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 (HL) at 1214 and 1218.

<sup>98</sup> *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 (HL) at 1214-5. For a criticism of the court's use of these terms to clarify the reciprocal obligations in the contract see McBryde, 'Mutuality Retained: Bank of East Asia Ltd v Scottish Enterprise' (1996) 1 *Edin LR* 135 at 138.

<sup>99</sup> *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 (HL) at 1217. In *Macari v Celtic Football Club* 1999 SC 628 this requirement caused a problem in an employment context. Macari, the manager of Celtic Football Club, was dismissed for not complying with a residence clause. He argued that various acts by the club amounted to a breach of their implied obligation to act with 'mutual trust and confidence' and that this entitled him to withhold his performance under the residence clause. The First Division held that the club's obligation to act with 'mutual trust and confidence' was not a counterpart to Macari's obligation to obey the club's instruction that he comply with the residence clause. *Macari v Celtic Football Club* 1999 SC 628 at 633, 638 and 641-2. Thomson has argued (rightly) that an employer's obligation to act with mutual trust and confidence 'goes to the root of the employment relationship so much so that its counterpart must be all the obligations which the employee undertakes.' As a result, an employee wanting to suspend a performance obligation for such a breach cannot 'pick and chose' from his performance obligations but must suspend all his performance obligations. Thomson, 'An Unsuitable Case for Suspension? *Macari v Celtic Football Club*' (1999) 3 *Edin LR* 394 at 397. Thomson's criticism establishes that once an employee withholds part of his performance for an employer's breach of 'mutual trust and confidence', he will himself be in breach of contract and will not be able to claim that his right to remuneration for the period in question survives termination as an accrued right. It was stated in section 3.2.7 that as contractual arrangements vary widely, it is not sensible to search for a comprehensive list of guidelines which articulate which obligations are reciprocal to each other in a general sense. This point is recognised by McBryde when he states, citing *Sinwright v Lightbourne* (1890) 17 R 917, that the starting point must always be the parties' intentions as evidenced by the terms of the contract. McBryde, (1996) 1 *Edin LR* 139.



contractor to complete the defective work, must have terminated the contract for SM's breach. If this is true, then, for the reasons cited in the preceding subsection, the right of retention is in principle not directly applicable. Instead, the case should have been resolved by applying the accrued rights doctrine and by enquiring whether the right to restitution arose. What outcome would this analysis yield? It is clear that SM had delivered defective performance under the contract prior to 15 May 1990. It was established above that if the aggrieved party could have used the right of retention immediately prior to termination, then the right to the performance that has been repelled by the right of retention will not be an accrued right. Accordingly, the bank's right to receive the interim payment on 15 May should not have survived termination for breach.<sup>100</sup> As a result, the contractor would have to institute a restitution claim against the SDA to recover for the defective performance rendered. The SDA would in turn be entitled to a damages claim against the contractors for any additional losses suffered as a result of the breach.

This case neatly illustrates why, as a matter of equity, the right to a contractual performance should not survive termination for breach if the performance rendered has been defective. This is because the aggrieved developer will be left with a greater unsecured claim against the insolvent estate than would be the case if the contractors were compelled to institute a restitution claim to recover for their defective performance. This rests on the assumption that the restitution claim will be worth less than the contractually stipulated amount for proper performance. This assumption will only be untrue if the developer has entered into a losing contract.<sup>101</sup>

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<sup>100</sup> Even if the contractor had completed the work as per contract up until 15 May 1990, I argued in section 3.2.6(ii) that there are good reasons for holding that the right to claim payment is not independent of the executory part of the contract.

<sup>101</sup> See section 6.4.1 for an analysis of the contract breaker's claim for restitution of a performance resulting in a defective end product.

Although *Bank of East Asia* is to be welcomed in so far as it rectified some of the misconceived dicta about reciprocal obligations in *Turnbull v McLean*, it also reveals that Scots law has not fully appreciated the inner workings of accrued rights or the relationship between accrued rights and restitution.

### 3.3.3 Distinction between a Payment of the Contract Price and an Advance against Payment of the Contract Price

In Scots law the distinction between a payment of the contract price and an advance payment against a subsequent liability to pay the contract price originated in freight cases.

#### (i) *Watson v Shankland*

The Scots law on payment of freight was set out in *Watson v Shankland*.<sup>102</sup> The basic rule is that freight is payable on conclusion of the voyage. Complications arise where there is an early payment of freight (or part thereof) and the voyage is not completed. In *Watson v Shankland*, Lord President Inglis stated that there is a distinction between an advance against freight (or an advance on account of freight) and a payment of freight.<sup>103</sup> The former is recoverable if the voyage is not completed. In respect of the latter, the party who has made the payment is considered to have taken the risk that the voyage will not be completed and he cannot recover this early payment if that eventuality arises.

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<sup>102</sup> (1871) 10 M 142.

<sup>103</sup> *Watson v Shankland* (1871) 10 M 142 at 153 and 154.

This distinction has proved to be problematic. As MacQueen has pointed out, it is irreconcilable with *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. Ltd.*<sup>104</sup> In this case, an engineering firm contracted with a shipbuilding company to supply the latter with marine engines. The contract stated that the first instalment of the price was payable on conclusion of the contract. After the conclusion of the contract and the payment of the first instalment, the contract was frustrated as a result of the outbreak of the First World War. The purchasers claimed restitution of the instalment. It was clear that the instalment paid was not an advance against a future obligation to pay the full purchase price. Although payment of the purchase price was arguably reciprocal to delivery of the completed engines, it was clear that the obligation to pay the first instalment had arisen prior to delivery and was a payment of the contract price.

The House of Lords rejected this distinction since its application can lead to the purchaser unjustifiably forfeiting the purchase price without receiving any counter-performance. This is particularly acute when the full purchase price is paid before any counter-performance has been received.<sup>105</sup>

This leads MacQueen to the conclusion that the general rule in freight cases where payment is designed to follow performance ought not to be applied to cases where there is a different underlying rule as to the order of performance.<sup>106</sup> In my view, it would be preferable if the rule in freight cases is rationalised on the basis of the set of doctrines, set out in the rules, designed to regulate the consequences of termination for breach in a generalised and principled way.

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<sup>104</sup> 1923 SC (HL) 105. MacQueen, (1994) JR 137 at 146.

<sup>105</sup> See in particular the decisions of Lord Finlay and Lord Shaw in *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. Ltd* 1923 SC (HL) 105 at 115 and 121 respectively.

<sup>106</sup> MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts* (1997), 220.

The question that arises in these freight cases is whether the payer can recover the early payment. We know that the underlying rule is that freight is generally payable on completion of the voyage. This clearly indicates that the obligation to make payment of freight is reciprocal to the successful performance of the obligation to complete the voyage. Accordingly, in the absence of any contrary indication, the payee's right to receive (and retain) the early freight payment will not qualify as an accrued right until the voyage is complete. This is because the right to claim freight will not be, immediately prior to termination, independent of the executory part of the contract. If this is true, then the payment of freight prior to the completion of the voyage can be recovered with a restitution claim.

The critical question is whether there is a contrary intention which overturns the above conclusion. If it can be demonstrated that the parties intended that the payer was taking the risk of the voyage not being completed, then the payment can be retained by the payee. This is best viewed as a contractual exclusion of restitution. The important point is that from a conceptual point of view, the distinction between an advance against freight (or an advance on account of freight) and a payment of freight does no useful work.

The upshot is that Scots law ought to jettison the distinction used in *Watson v Shankland* in favour of a solution based on the doctrines set out in the rules. As a result, Scots law will not only avoid the undesirable results that can ensue from applying this distinction but will also have a set of doctrines of general application to regulate the economic consequences of termination for breach.

(ii) *Connelly v Simpson*<sup>107</sup>

The above claim is further supported by an analysis of *Connelly v Simpson*. The facts were as follows. C paid £16,000 for one-third of the shares in S's company. C negotiated for the right to demand delivery of the shares at some time in the future in order to minimise the value of his estate for his divorce proceedings. As a result of performing badly in the two years following the sale, S put the company into voluntary liquidation. The liquidator offered C £400 - a third of the remaining company assets. C alleged that S had breached the contract and instituted a restitution claim for £16,000.<sup>108</sup> The present interest lies in the fact that one of the grounds used by the court to reject C's claim was that it was not an advance against the purchase price but a payment of the purchase price.<sup>109</sup> This is unsatisfactory as an explanation for the decision.

It is necessary for the following analysis to assume that S was in breach and that C had terminated the contract for this breach.<sup>110</sup> The operative component of rule three and rule four, articulating the right to restitution, states that S is under a duty to restore the purchase price to C unless C's right to demand the exact reciprocal counter-performance from S survives termination for breach by being an accrued right. Clearly, C's right to demand the shares was accrued, due and enforceable and thus passes the first limb of the accrued rights test. C's right to demand the share certificate is not, however, independent of the executory part of the contract. This can be demonstrated as follows. Assume that C actually took delivery of the shares when he paid the purchase price and that he subsequently terminated the contract for S's breach. It is clear that rule three dictates that

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<sup>107</sup> 1993 SC 391.

<sup>108</sup> *Connelly v Simpson* 1993 SC 391 at 393-4.

<sup>109</sup> *Connelly v Simpson* 1993 SC 391 at 405.

<sup>110</sup> It is unfortunate that the case does not state unequivocally that S was in breach and that C terminated the contract for this breach. For some commentary on this aspect of the case see MacQueen, (1994) JR 143;

both C and S would be under an obligation to restore the share certificates and the purchase price respectively. There is no question of any rights surviving termination for breach in this instance. Indeed, this case maps squarely onto the paradigmatic example of the sale of a car and accordingly demonstrates that as a result of the retrospective effect of termination, both parties are under a duty to restore performances received prior to termination. If this is correct, then the fact that there was a time lag between the payment of the purchase price and delivery of the shares makes no principled difference as far as accrued rights and restitution are concerned. The point is that if C had received the share certificates and would have been able to reclaim the purchase price (subject to tendering the return of the share certificates), then logically he ought to be in the same position if he had merely received the right to demand the share certificates at some future date.

This case has divided the Scottish commentators. On the one hand, MacQueen has defended the decision on the basis that as C received what he bargained for - the right to demand the shares in the future - the court was justified in refusing C's claim for the return of the purchase price.<sup>111</sup> In other words, as the right to delivery of the shares survived termination, the obligation that is reciprocal to that right's correlative obligation - the payment of the purchase price - is excluded from the duty to restore.

On the other hand, Dieckmann and Evans-Jones suggest two different grounds on which the outcome of the case might be defended. First, the particular facts of the case justify an exception to the right to restitution. It is clear that C accepted the risk of the shares falling in value from the moment of the sale. The argument is that if the only reason S put the company into voluntary liquidation – making it impossible to deliver the shares - was because the company had done badly, then C is rightly refused restitution as this

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Dieckmann and Evans-Jones, 'The Dark Side of *Connelly v Simpson*' (1995) *JR* 90 at 96-7 and Scottish Law Commission, *Remedies for Breach of Contract* (Discussion Paper No. 109, 1999), para. 4.40 n74.

<sup>111</sup> MacQueen, (1994) *JR* 145-6.

eventually related to the risk that C undertook from the time of the sale.<sup>112</sup> Secondly, they argue that if S's breach was failing to consult C before putting the company into voluntary liquidation rather than rendering it impossible to deliver the shares, then this breach is not sufficiently material to justify termination. It follows that without termination there can be no claim for restitution.<sup>113</sup>

The point that emerges (by omission) from the above analysis is that the distinction between advances against the purchase price and payment of the purchase price does no useful work in resolving *Connelly*. This reinforces the claim that Scots law ought to abandon this distinction in favour of an approach which regulates the economic consequences of termination for breach according to the doctrines set out in the rules.

### 3.3.4 Doctrinal Basis of Accrued Rights

MacQueen has argued that as the survival of accrued rights limits the scope of the duty to restore, this points towards the enrichment-preventing nature of accrued rights.<sup>114</sup> Although this is undoubtedly true, it was pointed out in section 3.2.5(iii) that this does not mean that accrued rights ought to be rationalised on the basis of unjustified enrichment law.<sup>115</sup>

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<sup>112</sup> Dieckmann and Evans-Jones, (1995) JR 96. See also Evans-Jones, 'The claim to recover what was transferred for a lawful purpose outwith contract (*condictio causa data causa non secuta*)' (1997) AJ 139 at 170-1 and Evans-Jones, *Unjustified Enrichment* (2003), para. 6.123.

<sup>113</sup> Dieckmann and Evans-Jones, (1995) JR 97. See also Evans-Jones, 'The claim to recover what was transferred for a lawful purpose outwith contract (*condictio causa data causa non secuta*)' (1997) AJ 139 at 170-1.

<sup>114</sup> MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts* (1997), 217.

<sup>115</sup> This is implicit in MacQueen's analysis as deals with accrued rights in a section entitled 'Contract Rules which Prevent Unjustified Enrichment'. MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts* (1997), 216. See also Clive, *Judicial Abolition of the Error of Law Rule and its Aftermath*, (Appendix to Scottish Law Commission, Discussion Paper No. 99, 1996),

### 3.3.5 Lessons from and for Scots Law

The story of accrued rights in Scots law has not been an entirely happy one. The overarching problem is that Scots law does not have a theoretically satisfactory rule which articulates when a right survives termination for breach. In my view, this ill is best remedied by adopting South African law's formulation of the accrued rights doctrine. This will not involve a big step for Scots law as *Gibson v McNaughton*, *Turnbull v McLean*, and *Lloyds Bank plc v Bamberger* can all be rationalised on the basis of that formulation.

This will make the following three improvements to Scots law. First, Scots law would avoid interpreting the principle of mutuality to mean that the party in breach cannot, in any circumstances, sue on the contract for a performance. Although this interpretation of the mutuality principle has not led to an accrued rights case being incorrectly decided, it has the potential to do so and accordingly ought to be jettisoned.

Secondly, Scots law would clarify the relationship between the right of retention, accrued rights and restitution. This lack of clarity has mistakenly resulted in the right of retention being made available to the aggrieved party after termination for breach. This does not mean that the right of retention is irrelevant in determining whether a right survives termination. The relationship between the right of retention and the 'enforceability' requirement of the first leg of the accrued rights test is encapsulated in the following principle: if the aggrieved party could have raised the right of retention (or the *exceptio non adimpleti contractus* in South African law) against the contract breaker immediately prior to termination, then the right to the performance repelled by this defence will not fall under the accrued rights doctrine.

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rule 7(3) where the enrichment-based duty to restore excludes all accrued rights. The implication is that these contractual rights ought to be respected because of the contractually agreed bargain.



Thirdly, Scots law would jettison the distinction between the payment of the contract price and an advance payment against a subsequent liability to pay the contract price to resolve cases that ought to be resolved by applying the doctrines set out in the rules. It was pointed out that at best the distinction does no useful work and at worst can lead to unjust results.

## **Chapter 4**

### **The Doctrinal Basis of Restitution after Termination for Breach**

#### **4.1 Introduction**

This chapter and the following two chapters will consider the duty to restore performances ('restitution') received prior to termination for breach. The two most important questions that arise are as follows: (a) when does the right to restitution arise and (b) when this right arises, what is the quantum of this restitution claim? The main debate about restitution concerns its proper doctrinal basis or more precisely, whether it is better regarded as a remedy arising in the law of contract, the law of unjustified enrichment, or sometimes in the law of contract and sometimes in the law of unjustified enrichment. Although this debate does not quadrature precisely with the two abovementioned questions, there is a large overlap between them.

The aim of this chapter is to set the intellectual scene for a detailed consideration of the South African and Scots law. As a critical part of my argument relies on the inner workings of the law of unjustified enrichment, it is necessary first to outline the relevant law in both jurisdictions. Thereafter, the various academic approaches to the doctrinal basis of restitution will be considered. Finally, I will advance the approach that, in my view, ought to be adopted to resolve the debate about the proper doctrinal basis of restitution after termination for breach.

#### **4.2 Liability for Unjustified Enrichment in South African Law**

Recent cases and academic analysis have demonstrated that the taxonomy of

unjustified enrichment in South African law is in a state of flux. For the purposes of this thesis, a broad outline of this law is sufficient.

#### 4.2.1 Requirements of Enrichment Liability

The substance of the law of unjustified enrichment in South African law is usually articulated in terms of the specific enrichment actions. For present purposes, the most important of these are the *condictio causa data causa non secuta*; the *condictio sine causa specialis* in the form of the *condictio ob causam finitam*; and the action for work done and services rendered. Although South African law does not yet have a general enrichment action, there are four general requirements for enrichment liability underpinning the specific enrichment actions: (i) the defendant must be enriched; (ii) the plaintiff must be impoverished; (iii) there must be a causal link between the defendant's enrichment and the plaintiff's impoverishment (the 'at the expense of' requirement) and (iv) the enrichment must be unjustified ('the *sine causa* or 'without legal ground' requirement).<sup>1</sup> In the context of restitution after termination for breach, the second and third requirements are unproblematic. This leaves the 'enrichment' and the '*sine causa*' requirements. The former will be discussed in chapter six.

Given that South African law does not have a general enrichment action, there is no definitive definition of the *sine causa* requirement. In an excellent recent survey of this requirement in mixed legal systems, Jacques Du Plessis has stated that the notion of

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<sup>1</sup> The Supreme Court of Appeal has recently stated, *obiter*, that there is sufficient authority for the recognition of a general enrichment action in South African law. See *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA). For an overview of the various elements see Hutchison *et al.*, *Wille's Principles of South African Law* (1991), 630-5.

absence of legal ground is used in two contexts.<sup>2</sup> Firstly, the notion of absence of legal ground is reflected in two of the above named *condictiones*. Thus, the *condictio causa data causa non secuta* is applicable if something was transferred on the incorrect assumption that some future event would occur.<sup>3</sup> The *condictio sine causa specialis* is applicable where there is a transfer of something for a *causa* which, although it might have existed at the time of the transfer, has subsequently fallen away.<sup>4</sup> Secondly, *sine causa* is also used to refer to a requirement underpinning all enrichment claims in South African law that the enrichment must be ‘unjustified’ or ‘without legal ground’.

Du Plessis points out that there are many divergent views about the proper meaning of the *sine causa* requirement. On the narrower interpretation, *sine causa* means that an enrichment is without legal ground if the benefit has been derived without legal title. Legal title will be missing if the benefit was derived in the absence of a valid obligation.<sup>5</sup> On this narrow interpretation, it is not sufficient to establish enrichment liability that there is an absence of legal ground. In addition, the requirements of the specific enrichment actions will have to be met before such enrichment liability is said to lie.

The broader approach to the *sine causa* requirement regards legal ground to be missing when any element of a specific enrichment action is absent. Thus the elements of a specific enrichment action taken together in any particular situation determine

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<sup>2</sup> Du Plessis, ‘Towards a rational structure of liability for unjustified enrichment: Thoughts from two mixed jurisdictions’ (2005) 122 *SALJ* 142 at 148-52.

<sup>3</sup> Lotz, ‘Enrichment’ in *The Law of South Africa* (vol. 9, first reissue, revised by Horak, 1996), para. 85.

<sup>4</sup> See Lotz, ‘Enrichment’ in *The Law of South Africa* (vol. 9, first reissue, revised by Horak, 1996), para. 88 n3 and Zimmermann, *The Law of Obligations* (1990), 855. In *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at 201 the *condictio ob causam finitam* was described as an ‘offshoot of the *condictio sine causa specialis*.’ This *condictio* would, for example, be applicable where a contractual obligation is terminated due to supervening impossibility of performance.

<sup>5</sup> Du Plessis, ‘Towards a rational structure of liability for unjustified enrichment: Thoughts from two mixed jurisdictions’ (2005) *SALJ* 150.

whether the enrichment is *sine causa*.<sup>6</sup>

For the present study the important taxonomic question is whether it is possible, in principle, for restitution after termination for breach to meet the requirements of an enrichment claim in South African law.

#### 4.2.2 Measure of Recovery

The measure of recovery in an enrichment claim in South African law differs depending on the type of redress sought. This can vary depending on the type of enrichment received.<sup>7</sup>

##### (i) *Specific Restitution*

When the restitution claim is for the return of a specific returnable benefit, the recipient is under an obligation to return the specific thing itself together with its fruits (less the cost of production) and accessions.<sup>8</sup> Where the recipient is no longer in possession of the benefit transferred or its equivalent, he is liable to the extent that he still remains enriched. Thus, he is liable for its surrogate if one exists (e.g. where the recipient has sold the thing, he is liable to restore the purchase price or the net profit) or its value.

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<sup>6</sup> Du Plessis, 'Towards a rational structure of liability for unjustified enrichment: Thoughts from two mixed jurisdictions' (2005) *SALJ* 151.

<sup>7</sup> Whitty and Visser, 'Unjustified Enrichment' in Zimmermann, Visser and Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004), 399 at 433.

<sup>8</sup> Lotz, 'Enrichment' in *The Law of South Africa* (vol. 9, first reissue, revised by Horak, 1996), para. 80.

(ii) *Restitution of Money or (Consumed) Fungibles*

Where the benefit transferred consists of money or a fungible, the recipient is liable to return the principal sum. The common law principle that the recipient is not liable for interest on the principal sum has now been superseded by section 2A of the Prescribed Rate of Interest Act 7 of 1997, which states that every unliquidated debt will bear interest at the rate determined by the Minister of Justice.<sup>9</sup> Where the recipient has rendered counter-performance corresponding to his receipt of the transfer to him, he may refuse to restore the benefit received until the claimant tenders restoration of the benefit conferred on him (by the recipient).<sup>10</sup>

(iii) *Compensation for Work Done or Services Rendered*

When a contract has been terminated for breach, South African law states that both parties' claims for compensation for work done or services rendered are enrichment remedies.<sup>11</sup> It has been said that in principle the plaintiff's enrichment claim is limited to the lesser of the market value of his expenditure or the aggrieved party's enrichment. In contracts of hire (*locatio conductio operis*), there are limited instances where the contract price has been used to determine the recipient's enrichment.<sup>12</sup> In contracts of employment (*locatio conductio operarum*) where the employer's enrichment takes the

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<sup>9</sup> For the common law see *Baliol Investment Co. (Pty) Ltd v Jacobs* 1946 TPD 269.

<sup>10</sup> Lotz, 'Enrichment' in *The Law of South Africa* (vol. 9, first reissue, revised by Horak, 1996), para. 80.

<sup>11</sup> *BK Tooling (Edms) Bpk v Scope Precision Engineering* 1979 (1) SA 391 (A) at 436 (translation) and *Spencer v Gostelow* 1920 AD 617 at 625-6. This position is unequivocally accepted by academics as being correct in South African law. See for example Lubbe and Murray, *Farlam and Hathaway-Contract: Cases Materials and Commentary* (1988), 593 n4; De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987), 279; 285 and 287; Visser, 'Rethinking Unjustified Enrichment: A Perspective of the Competition between Contractual and Enrichment Remedies' (1992) *AJ* 203 at 208 and Hutton, 'Restitution after Breach of Contract: Rethinking the Conventional Jurisprudence' (1997) *AJ* 201.

<sup>12</sup> The authorities, such that there are, will be discussed in chapter 6.

form of expenses saved, the measure of recovery is said to be determined by reference to the contractual salary or wages.<sup>13</sup> The role of the contract price in determining the quantum of restitution is a vexed problem and will be considered in chapter six.

### 4.2.3 Change of Position

In South African law 'loss of enrichment' is the functional equivalent of 'change of position' in Scots and English law. The importance of this defence is that, if successfully pleaded, it allows the recipient of an enrichment to repel (or partially repel) the impoverished party's claim for restitution. In South African law, the recipient's enrichment is measured at the time of *litis contestatio* (the close of pleadings). Accordingly, the recipient is only liable for the enrichment (or, in some cases, the value thereof) surviving in his hands at *litis contestatio*.<sup>14</sup> The onus of proving that the enrichment has been lost is on the recipient. The general position in South African law can be stated thus: the recipient of a benefit is assumed to be enriched unless he can prove that this is no longer the case at the date of *litis contestatio*.<sup>15</sup> Although this appears to be the general position, commentators have recently noted that the precise limits of the defence have not been explored in South African law.<sup>16</sup> A critical question that remains unclear is whether the courts have the right to refuse to grant the defence on purely equitable grounds.

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<sup>13</sup> See De Vos, *Verrykingsaanspreeklikheid* (1987), 295-6.

<sup>14</sup> *African Diamond Exporters (Pty) Ltd v Barclays Bank International* 1978 (3) SA 699 (A). This approach is endorsed by the leading commentators. See Visser, (1992) *AJ* 194; Lotz, 'Enrichment' in *The Law of South Africa* (vol. 9, first reissue, revised by Horak, 1996), para. 76 and De Vos, *Verrykingsaanspreeklikheid* (1987), 200ff.

<sup>15</sup> In the case of partial loss of enrichment which does not yield a surrogate the recipient is only liable for the enrichment remaining.

<sup>16</sup> Whitty and Visser, 'Unjustified Enrichment' in *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004), 435-6.

### 4.3 Liability for Unjustified Enrichment in Scots Law

If the South African law of unjustified enrichment is in state of flux, the law of unjustified enrichment in Scotland has, in one commentator's words, undergone a 'revolution'.<sup>17</sup> Although progress has been made, much remains unsettled.

#### 4.3.1 Requirements of Enrichment Liability

##### (i) *Pre 1995: Three Rs and Conditiones*

Until 1995 the Scots law of unjustified enrichment was characterised by an amalgam of the three Rs (restitution, repetition and recompense) and the *conditiones*. Much has been written about the true basis of the three R's and their relationship to the *conditiones*. There is, however, little agreement. As Evans-Jones has pointed out, there are several theories rationalising the distinction between the three R's, namely, that it was founded upon: (a) the type of benefit received; (b) the quantum of recovery; (c) whether the content of the obligation was the restoration of a *certum* or an *incertum*; (d) recompense as a general enrichment action; or (e) an haphazard historical accident without a satisfactory basis.<sup>18</sup> Fortunately, subsequent developments in the case law have made it unnecessary to resolve this debate.

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<sup>17</sup> Whitty, 'The Scottish Enrichment Revolution' (2001) 6 *SLPQ* 167.

<sup>18</sup> Evans-Jones, 'Unjustified Enrichment' in Reid and Zimmermann (eds), *A History of Private Law in Scotland* (2000), 369 at 372-396. See also Evans-Jones and Hellwege, 'Some Observations on the Taxonomy of Unjustified Enrichment in Scots Law' (1998) 2 *Edin LR* 180.



(ii) *The 1995-1998 Trilogy of Cases*

In *Morgan Guaranty Trust Company of New York v Lothian Regional Council* Lord

President Hope stated the following about the three Rs:

‘[a]s a general rule it would appear that restitution is appropriate where the demand is for the return of corporeal property, repetition where the demand is for the repayment of money and recompense where the defender has been enriched at the pursuer’s expense in the implement of a supposed obligation under a contract other than by the delivery of property or the payment of money. Recompense will be available, as a more broadly based remedy, in cases where the benefit was received by the defender in circumstances other than under a contract or a supposed contract.’<sup>19</sup>

The problem with this approach, which is based on the differences in the nature of the remedy, is that it implies that causes of action differ merely because the enrichment takes a particular form.<sup>20</sup>

Three important improvements were made by *Morgan Guaranty*. First, the court stated that restitution, repetition and recompense all served the same purpose, namely, ‘to redress an unjustified enrichment ...’<sup>21</sup> By recognising that a single general principle underpinned each of the remedies, the court solved many of the problems that beset the classification of unjustified enrichment according to the three Rs.

Secondly, *Morgan Guaranty* also established that all enrichment claims had certain common components: (i) the defender must be enriched; (ii) the pursuer must be impoverished; (iii) there must be a causal link between the defender’s enrichment and the pursuer’s impoverishment (the ‘at the expense of’ requirement); (iv) the enrichment

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<sup>19</sup> 1995 SC 151 at 155. For similar statements see also Lord President Hope in *Dollar Land (Cumberland) Ltd v CIN Properties Ltd* 1998 SC 90 (HL) at 99.

<sup>20</sup> See Birks, ‘Restitution: A View of Scots Law’ (1985) 38 CLP 57 at 63.

<sup>21</sup> *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151 at 155. See also *Dollar Land (Cumberland) Ltd v CIN Properties Ltd* 1998 SC 90 (HL) at 98.

must be unjustified (‘the *sine causa* or ‘without legal ground’ requirement) and (v) it must not be inequitable for the court to grant the remedy.<sup>22</sup>

Finally, *Morgan Guaranty* held that any of the three Rs would be available ‘when the enrichment lacks a legal ground to justify the retention of the benefit’, and, as a result, is ‘[i]n such circumstances ... held to be unjust.’<sup>23</sup>

The role of the three Rs and the *condictiones* was further clarified by Lord Rodger in *Shilliday v Smith*.<sup>24</sup> In addition to endorsing the ‘without legal ground’ approach to the *sine causa* requirement, it was held that repetition, restitution and recompense should no longer be treated as categories of the substantive law of obligations but rather as examples of remedies reversing an unjustified enrichment. Repetition is used to claim the return of money paid. Restitution is used to claim the return of property transferred, and recompense is used when services have been rendered. The *condictiones* were said to refer not to forms of action or remedies but rather to groups of factual situations ‘in which the law may provide a remedy because one party is enriched at the expense of the other’.<sup>25</sup> Accordingly, these groups of factual situations form grounds of action for the redress of unjustified enrichment and, if established, indicate that the enrichment has no legal justification and should be reversed.

Although *Shilliday* solved many of the previous difficulties encountered in this area, Lord Rodger did not clarify in precise terms how Scots law ought to test whether an enrichment is unjustified. *Shilliday* was decided amidst intense taxonomic debate in

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<sup>22</sup> *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151 at 155 and 165-6. The fifth requirement is not technically an element of the cause of action in unjustified enrichment. Instead, *Morgan Guaranty* makes it clear that once the other four elements have been established by the pursuer, it is open to the defender to demonstrate, as a defence, that it would be inequitable for the court to grant the claim.

<sup>23</sup> *Dollar Land (Cumberland) Ltd v CIN Properties Ltd* 1998 SC 90 (HL) at 98.

<sup>24</sup> 1998 SC 725.

<sup>25</sup> *Shilliday v Smith* 1998 SC 725 at 728.

Scotland. The battle was whether Scots law ought to follow the ‘unjust factor’ approach of English law or whether it should adopt a scheme akin to the ‘without legal ground’ approach of German law. Lord Rodger did not come down unequivocally on either side. Indeed, there are divergent views on which approach the judgment endorses. One commentator has taken *Shilliday* to endorse the ‘unjust factor’ approach originally advocated by Peter Birks.<sup>26</sup> Another view is that *Shilliday* blends the civilian ‘without legal ground’ approach with the unjust factor approach of the common law to form a novel taxonomy.<sup>27</sup> According to this view, *Shilliday* starts from the basic civilian principle that an enrichment should be reversed when it is retained without legal ground, but then, without a wholesale adoption of the unjust factor approach, follows its mode of thought by using the unjust factors to articulate why an enrichment is retained without legal ground.<sup>28</sup>

Although the taxonomic debate in Scots law looks set to continue, it appears that ‘without legal ground’ will play a central role in determining whether an enrichment is unjustified.<sup>29</sup> This is reinforced by the recent successful attack on the unjust factor approach by Sonia Meier.<sup>30</sup> This attack has led Peter Birks, previously the chief advocate of

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<sup>26</sup> Stewart, ‘*Shilliday v Smith*’ (1998) 6 RLR 260 at 261. There are statements in *Shilliday v Smith* where Lord Rodger does refer with approval to Peter Birks’ work. See *Shilliday v Smith* 1998 SC 725 at 727. Cf Hellwege, ‘Rationalising the Law of Unjustified Enrichment’ (2000) *Stell LR* 50 at 58 who takes *Shilliday v Smith* to endorse the demise of the ‘unjust factor’ approach advocated by Stewart. For a view which also rejects the ‘unjust factor’ interpretation of *Shilliday v Smith* see Visser, ‘Unjustified Enrichment in Mixed Legal Systems’ (unpublished plenary paper, conference in honour of Marcel Henri Bregstein on the ‘European Law of Contract and Unjustified Enrichment’ held at the Free University of Amsterdam in October 2000) extracts from which are cited in Whitty, (2001) 6 *SLPQ* 167 at 185. For an analysis of these view see Du Plessis, ‘Towards a rational structure of liability for unjustified enrichment: Thoughts from two mixed jurisdictions’ (2005) *SALJ* 162-72.

<sup>27</sup> Visser, ‘Unjustified Enrichment in Mixed Legal Systems’ (unpublished plenary paper, conference in honour of Marcel Henri Bregstein on the ‘European Law of Contract and Unjustified Enrichment’ held at the Free University of Amsterdam in October 2000) extracts from which are cited in Whitty, (2001) 6 *SLPQ* 167 at 185.

<sup>28</sup> One commentator has expressed concerns that this could lead to a system of unjust factors being adopted via the back door. See Whitty, (2001) 6 *SLPQ* 185-6.

<sup>29</sup> For a concise summary of all the possible suggestions as to the way Scots law might proceed see Whitty, (2001) 6 *SLPQ* 174-86.

<sup>30</sup> Meier, ‘Unjust Factors and Legal Grounds’ in Johnston and Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 37. See also Meier and Zimmermann, ‘Judicial Development of the Law, *Error Iuris*, and the Law of Unjustified Enrichment – A View from Germany’ (1999) 115 *LQR* 556 at 563.

that approach, to beat an agonised retreat in favour of the civilian starting point.<sup>31</sup>

According to Du Plessis there is evidence that, like South African law, Scots law also interprets the ‘without legal ground’ requirement in both a narrow and a broad way. In the narrow sense, ‘without legal ground’ means that an enrichment claim will, in principle, be available if the enrichment was derived without legal title. On this view, an enrichment will only ultimately be unjustified if additional requirements are established.<sup>32</sup> These additional requirements are probably to be found in the requirements of the specific *conditiones* and the 3Rs (when they were viewed as substantive grounds of action in the pre-1995 taxonomy). In the broad sense, the ‘without legal ground’ requirement includes all the elements that are required to mount a successful enrichment claim.<sup>33</sup>

Once again, the important taxonomic question for the present study is whether it is possible, in principle, for restitution after termination for breach to meet the requirements of an enrichment claim in Scots law.

#### 4.3.2 Measure of Recovery

Akin to the position in South African law, the measure of recovery in an enrichment claim in Scots law also differs depending on the type of redress sought. According to Evans-Jones, Scots law distinguishes between cases where the defender is obliged to restore a *certum* (the exact thing or sum of money that was received) or to restore an *incertum* (a benefit that cannot be exactly restored).

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<sup>31</sup> Peter Birks, *Unjust Enrichment* (2003), 39-40.

<sup>32</sup> See for example Whitty, ‘Rationality, Nationality and the Taxonomy of Unjustified Enrichment’ in Johnston and Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 658 at 692 n201.

<sup>33</sup> Du Plessis, ‘Towards a rational structure of liability for unjustified enrichment: Thoughts from two mixed jurisdictions’ (2005) *SALJ* 153.

(i) *Specific Restitution*

When the restitution claim is for the return of a specific returnable benefit, the recipient is under an obligation to return the specific thing in the same condition that it was received (barring accidents).<sup>34</sup> The recipient is also obliged to restore all surviving fruits (or their surrogate) and accessions.<sup>35</sup> Where the recipient is no longer in possession of the benefit transferred or its equivalent, then he is liable to the extent that he still remains enriched. Thus, he is liable for its surrogate if one exists (e.g. where the recipient has sold the thing, he is liable to restore the purchase price or the net profit) or its value.<sup>36</sup>

(ii) *Restitution of Money or (Consumed) Fungibles*

In a claim for money, the recipient is obliged to restore the sum received.<sup>37</sup> In contrast to the common law position in South Africa, the pursuer can claim interest on the principal sum from the date of payment until the time the claim is raised.<sup>38</sup>

(iii) *Compensation for Work Done or Services Rendered*

Where a service results in an end product or in improvements to the recipient's

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<sup>34</sup> Bell, *Principles of the Law of Scotland* (1899), s537.

<sup>35</sup> Reid, 'Unjustified Enrichment and Property Law' (1994) JR 167 at 196-7. Where the fruits have been consumed the defender-possessor will, however, only be liable if he has consumed them in bad faith. For a comprehensive discussion see Evans-Jones, *Unjustified Enrichment* (2003), paras 9.34-40.

<sup>36</sup> Hogg, *Obligations* (2003), paras 4.19-20. Evans-Jones, *Unjustified Enrichment* (2003), para. 9.33.

<sup>37</sup> *Shilliday v Smith* 1998 SC 725 at 728. See Evans-Jones, *Unjustified Enrichment* (2003), para. 9.11.

<sup>38</sup> See *Gwydyr v Lord Advocate* (1894) 2 SLT 260; *Countess of Cromertie v Lord Advocate* (1871) 9 M 988 at 991 and *Duncan, Galloway and Co. Ltd v Duncan, Falconer and Co.* 1913 SC 265. For a full discussion see Evans-Jones, *Unjustified Enrichment* (2003), paras 9.41-55.

estate, the Scottish courts are likely to apply the *quantum lucratus* measure to assess the value of the enrichment.<sup>39</sup> This refers to the increase in the objective market value of the estate. Where no such end product results, as would be the case with a so-called pure service, then the enrichment is probably measured by calculating the expense the recipient saved by receiving that service. The reference point is the market value of the services rendered.<sup>40</sup>

### 4.3.3 Change of Position

The recipient of a benefit will be relieved of his enrichment obligation where he has changed his position in the belief that he is the owner of that enrichment and the courts deem that it would be inequitable to enforce the enrichment obligation.<sup>41</sup> The leading case in Scots law is *Credit Lyonnais v George Stevenson & Co. Ltd* where it was stated that

‘[i]n my opinion, the defenders in order to establish such a defence would require to show (1) that they had reasonable grounds for believing that the money was theirs; and (2) that having that reasonable belief, they acted upon it so as to alter their position in such manner as to make repetition unjust.’<sup>42</sup>

Where expenditure is saved, the saving itself can never be lost. Accordingly, the

<sup>39</sup> *Buchanan v Stewart* (1874) 2 R 78. See also the discussion by Hogg, *Obligations* (2003), para. 4.37.

<sup>40</sup> See Evans-Jones, *Unjustified Enrichment* (2003), paras 9.14-8. Although the contract breaker’s claim in Scots law is probably enrichment-based, the doctrinal basis of the aggrieved party’s *quantum meruit* claim for non-returnable benefits is unclear. This is discussed in chapter 6.

<sup>41</sup> *Crédit Lyonnais v George Stevenson and Co. Ltd* (1901) 9 SLT 93 at 95. See also *Bank of Scotland v Grimm-Foxen* [1992] GWD 37-2171; Borland, ‘Change of Position in Scots Law’ 1996 *SLT (News)* 139 and Evans-Jones, *Unjustified Enrichment* (2003), para. 9.59ff.

<sup>42</sup> *Credit Lyonnais v George Stevenson & Co. Ltd* (1901) SLT 95. Borland has pointed out that this dictum actually specifies three requirements for the defence: (1) a reasonable belief by the defender that he was entitled to the benefit; (2) a causal link between the belief and the change of position; and (3) that it would be unjust to allow the claim. Borland, 1996 *SLT (News)* 139-40.

plea of loss of enrichment or change of position does not apply to actions where the measure of recovery is based on expenditure saved (e.g. in the action for compensation/recompense for work done or services rendered).

One important factor relevant to the present study is the role of fault in the change of position defence. Unfortunately, the law is unclear. According to Borland, fault is relevant to determining which of the parties ought to bear the loss.<sup>43</sup> Evans-Jones argues against this approach and points out that in any event, *Credit Lyonnais* is not clear on the role of fault in the change of position defence.<sup>44</sup>

The matter is further complicated by *Royal Bank of Scotland plc v Watt*.<sup>45</sup> Watt received money which emanated from a fraud. Watt handed this money over to the fraudster shortly after it reached his account.<sup>46</sup> Although Watt was found to be in good faith with regards to his role in the fraud, the court rejected a plea equivalent to the change of position defence on the basis that he had been ‘... careless to the point of recklessness’ in his participation in the fraud.<sup>47</sup> In this light, *Royal Bank of Scotland plc v Watt* appears to support the view that the change of position defence in Scots law is part of a broader equitable defence in terms of which the court will balance the equities between the parties in order to decide whether to allow an enrichment claim to succeed. Hellwege has criticised the decision on the basis that an approach that simply seeks to balance the equities operates too arbitrarily. In his view, the Scottish courts should rather seek to work out the precise requirements of the defence in a more principled

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<sup>43</sup> Borland, 1996 *SLT* (News) 140.

<sup>44</sup> For a discussion of this point see Evans-Jones, *Unjustified Enrichment* (2003), para. 9.68. While admitting the possibility of looking at fault issues in limited circumstances, Evans-Jones is generally against the use of fault as a mechanism of apportioning losses between the parties in enrichment cases. Evans-Jones, *Unjustified Enrichment* (2003), para. 9.68.

<sup>45</sup> 1991 SC 48.

<sup>46</sup> For the facts see *Royal Bank of Scotland plc v Watt* 1991 SC 48 at 54-5.

<sup>47</sup> *Royal Bank of Scotland plc v Watt* 1991 SC 48 at 64.



way.<sup>48</sup>

In sum, the change of position defence in Scots law, like its counterpart in South African law, has not reached an advanced stage of development and cannot, as a result, be regarded as settled.

#### **4.4 Doctrinal Basis of Restitution**

There are deeply divided views in South African and Scots law about the proper doctrinal basis of restitution after termination for breach. Despite this divergence of opinion, it will be shown that the commentators in both jurisdictions have relied, by and large, either on considerations of abstract taxonomic doctrine or on an historical analysis of a particular enrichment action. These views will be considered after a brief overview of the current law in both jurisdictions.

##### **4.4.1 Doctrinal Basis of Restitution in South Africa and Scotland: Current Law**

Although a detailed examination of the case law is undertaken in the following two chapters, it is useful at this stage to have a broad overview of the current South Africa and Scots law. Restitution in South African law is asymmetrical in that its doctrinal basis depends on whether the benefit conferred is, on the one hand, a money benefit or a returnable benefit in kind or, on the other, by its very nature inherently non-returnable. In Scots law, uncertainty about the doctrinal basis of restitution precludes generalisation.

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<sup>48</sup> Hellwege, 'The Scope and Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study' (1999) 7 RLR 92 at 102. For a similar call see also Burrows, 'Swaps and the Friction between Common Law and Equity' (1995) 3 RLR 15 at 21. Cf Evans-Jones, *Unjustified Enrichment* (2003), para. 9.71 for a defence of the outcome in *Royal Bank of Scotland plc v Watt*.



(i) *Money Benefits and Returnable Benefits in Kind*

When a contract is terminated for breach, South African and Scots law grant both the aggrieved party and the contract breaker the right to claim restitution of a money benefit or a returnable benefit in kind conferred prior to termination.<sup>49</sup> Although there is no clear authority in Scots law establishing the doctrinal basis of restitution of money benefits or returnable benefits in kind, the weight of authority favours unjustified enrichment.<sup>50</sup> The following dictum by Cloete J in *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* indicates that South African law is unequivocal in stating that the claim for restitution of these benefits is a distinct contractual remedy:

‘... a claim for restitution of performance upon cancellation of a contract for breach is a distinct contractual remedy: *Baker v Probert* 1985 (3) SA 429 (A) at 438I-439B. The vexed question whether the duty to restore the performance of a party as a consequence of the cancellation of a contract due to a breach is a contractual remedy or an enrichment action, which had its roots in the divergent views of the Sabinians and Proculians in the Roman law and persisted in the Roman-Dutch law ... was settled by that case.’<sup>51</sup>

(ii) *Inherently Non-Returnable Benefits*

Both jurisdictions treat restitution of inherently non-returnable benefits as an unjustified enrichment remedy. This is more clearly articulated by the South African courts than by their Scottish counterparts.<sup>52</sup> Two examples of this type of benefit are the

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<sup>49</sup> For South African law see *Bonne Fortune Beleggings Bpk v Kalabari Salt Works (Pty) Ltd* 1974 (1) SA 414 (NC) at 423-4; *Van Heerden v Sentrale Kunsmiskorporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 31 and *Baker v Probert* 1985 (3) SA 429 (A) at 438. For Scots law see *McCormick v Rittmeyer* (1869) 7 M 854 at 858 and *Lloyds Bank plc v Bamberger* 1993 SC 570 at 573. The right to claim restitution is not as clearly established in Scots law as it ought to be. For a full discussion see sections 5.3.1(i)(b) and 6.3.2(ii).

<sup>50</sup> Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (1870), 478.

<sup>51</sup> 1998 (4) SA 802 (W) at 807. Cf *Cloete v Union Corporation Ltd* 1929 TPD 508 at 521.

<sup>52</sup> For South African law see *BK Tooling (Edms) Bpk v Scope Precision Engineering* 1979 (1) SA 391 (A) at 436 and *Spencer v Gostelow* 1920 AD 617 at 625-6. This position is unequivocally accepted by academics as

provision of services and the erection of buildings on land.

Closely allied to the question about the doctrinal basis of restitution of inherently non-returnable benefits is the question about the proper doctrinal basis of *quantum meruit* claims. Neither South African law nor Scots law has answered this question definitively.<sup>53</sup> As the two questions are substantially similar, the latter can be subsumed into the more general question as to whether restitution after termination for breach is best classified exclusively on the principles of unjustified enrichment, exclusively on the principles of contract, or sometimes on the principles of unjustified enrichment and sometimes on the principles of contract.

#### 4.4.2 Restitution is an Unjustified Enrichment Remedy

##### (i) Introduction

Over the past decade, the majority of scholars in South African and Scots law have argued, in line with their counterparts in English law, that restitution after termination for breach ought to be classified as an enrichment remedy.<sup>54</sup>

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being correct in South African law. See for example, Lubbe and Murray, *Farlam and Hathaway-Contract: Cases Materials and Commentary* (1988), 593 n4; De Vos, *Verrykingsaanspreeklikheid* (1987), 279; 285 and 287; Visser, (1992) *AJ* 203 and Hutton, (1997) *AJ* 201. For Scots law see *Ramsay v Brand* (1898) 25 R 1212; *Kerr v Dundee Gas Light Co.* (1861) 23 D 343; *P.E.C. Barr Printers Ltd v Forth Print Ltd* 1980 SLT (Sh Ct) 118 and *Watson v Shankland* (1871) 10 M 142 at 152. Despite dicta in these cases which refer to the availability of enrichment claims in this context, there are few instances where enrichment claims have actually been granted by the Scottish courts. See MacQueen, 'Unjustified Enrichment and Breach of Contract' (1994) *JR* 137 at 162.

<sup>53</sup> In South African law there is a trilogy of cases which have held that a *quantum meruit* claim is based on the principles of unjustified enrichment. See *Hauman v Nortje* 1914 AD 293; *Breslin v Hichens* 1914 AD 312 and *Van Rensburg v Straughten* 1914 AD 317. It has, however, subsequently been held that this claim is contractual. See *BK Tooling (Edms) Bpk v Scope Precision Engineering* 1979 (1) SA 391 (A) and *Thomson v Scholtz* 1999 (1) SA 232 (SCA). For an analysis of *quantum meruit* claims in Scots law see Wolffe, 'Contract and Recompense: *ERDC Construction Ltd v HM Love & Co*' (1997) 1 *Edin LR* 469.

<sup>54</sup> Visser, (1992) *AJ* 203; Hutton, (1997) *AJ* 201 and MacQueen, (1994) *JR* 137. Cf MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (1997), 199.

These arguments have relied primarily on the theory that the law of obligations is divided into at least three major branches - contract, delict and unjustified enrichment - with each branch demarcating a largely autonomous territory. According to this theory, the classification of obligations reflects the events which generate legal rights and duties.<sup>55</sup> The type of event which gives rise to a contractual right is consensus (and sometimes reliance) whereas the type of event which gives rise to an enrichment right is the retention of a benefit *sine causa*. This differentiation between the types of events is intended to show that the three branches of obligations give rise to three independent causes of action. Furthermore, underpinning each type of event is one defining or unifying principle: contract concerns binding promises and agreements and unjustified enrichment is based on the principle that no one should be unjustifiably enriched at another's expense.

This theory is used to support the claim that contractual remedies and unjustified enrichment remedies ought to be distinguished from each other by considering the alignment between the unifying principle of one of the branches of obligations and the principle of recovery underpinning a particular remedy. If the aim of a remedy is more closely connected to fulfilling the expectations created by the contract, then the remedy should be contractual. However, if the aim of a remedy aligns more closely with the principle that no one should be unjustifiably enriched at another's expense, then the remedy should be based on the rules of unjustified enrichment.<sup>56</sup>

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<sup>55</sup> Visser, (1992) *AJ* 209; Hutton, (1997) *AJ* 211-2 and MacQueen, (1994) *JR* 143-4. These authors rely to some extent on the works of Peter Birks and Andrew Burrows. See Birks, *An Introduction to the Law of Restitution* (1989), Chapter 2; Birks, 'Restitution and the Freedom of Contract' (1983) 36 *CLP* 141 at 146; and Burrows, 'Dividing the Law of Obligations' in Burrows (ed), *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (1998), 1. Birks has subsequently changed some of his views on classification. See for example Birks, 'Misnomer' in Cornish *et al.* (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998), 1; Birks, 'Rights, Wrongs and Remedies' (2000) 20 *OJLS* 1 and Birks, *Unjust Enrichment* (2003), chapter 1. See section 4.4.4(ii)(c) for an outline of Birks' new classificatory scheme.

<sup>56</sup> Visser, (1992) *AJ* 208-10; Hutton, (1997) *AJ* 211-2 and MacQueen, (1994) *JR* 143-4.

Those who argue for an increased application of the law of unjustified enrichment after failed contracts consider that certain remedies arising in the three species of contractual failure fit into the latter category.

(ii) *Peter Birks: The Original Scheme*

Peter Birks is the wellspring of the ideas about the classifying obligations according to causative events (outlined in the introduction) and its implications for the doctrinal basis of restitution after termination for breach. Originally, Birks believed that there was a perfect quadrature between the causative event of unjust enrichment and the response of restitution.<sup>57</sup> In other words, restitution (in the sense of having to give something back) is always the response to unjustified enrichment and unjustified enrichment is always the event which triggers restitution.<sup>58</sup> Logically, in order to establish that restitution after termination for breach qualified as an enrichment remedy it was simply necessary to establish that the duty to restore arose after such termination. In English law this duty arises when the requirements of 'failure of consideration' are met. Essentially, this occurs when the party claiming restitution has not received the bargained-for counter-performance.<sup>59</sup> The full argument explaining why these requirements are met after termination for breach is set out in subsection (v) below.

In terms of Birks' original taxonomy, the English law of unjustified enrichment was arranged around a series of 'unjust factors'.<sup>60</sup> As restitution met the requirements of

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<sup>57</sup> Birks, *An Introduction to the Law of Restitution* (1989), 16-7. See also McInnes, 'Restitution, Unjust Enrichment and the Perfect Quadrature Thesis' (1999) 7 RLR 118.

<sup>58</sup> Birks, 'Misnomer' in *Restitution: Past, Present and Future* (1998), 1 and Birks, (2000) 20 OJLS 1. Birks has since recanted from the perfect quadrature thesis. Accordingly, the response of restitution may be triggered by causative events other than unjust enrichment. See Birks, 'Misnomer' in *Restitution: Past, Present and Future* (1998), 6ff; Birks, (2000) 20 OJLS 1 and Birks, *Unjust Enrichment* (2003), 23-4.

<sup>59</sup> Burrows, *The Law of Restitution* (2002), 324ff.

<sup>60</sup> Birks, (1985) 38 CLP 65-7.

'failure of consideration', this qualified as one of the factors establishing a cause of action in unjust enrichment. As a matter of logic, it follows from the perfect quadration thesis that Birks' considers restitution after termination for breach to arise uniformly in unjustified enrichment.<sup>61</sup>

As we shall see below, Birks' arguments played a significant role in shaping Sally Hutton's views.

(iii) *Joubert*

The seeds of the approach described in the introduction were planted in South African law by Joubert. In justifying his argument that restitution after termination is an enrichment remedy, Joubert focuses on the *sine causa* requirement. He argues that although there is a valid *causa* for the initial transfer of the performance under the contract, this *causa* falls away when the contract is terminated for breach. This leads Joubert to the conclusion that the resulting claim for restitution is an unjustified enrichment remedy based on an analogy of the *condictio causa data causa non secuta* or the *condictio ob causam finitam*.<sup>62</sup> This argument rests on the proposition that the *sine causa* requirement for an enrichment claim ought to be considered with reference to the *causa retinendi* (the justification for the retention) of a benefit as opposed to the *causa dandi* (the justification for the initial transfer) of that benefit.

As we shall see below, this argument laid part of the foundation for Sally Hutton's deeper analysis along similar lines.

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<sup>61</sup> See for example, Birks, *An Introduction to the Law of Restitution* (1989), 220-1 and 234-5.

<sup>62</sup> Joubert, 'Restitutie na Terrugtrede' (1981) *De Jure* 222 at 224. See also Joubert, *General Principles of Contract Law* (1987), 245. For a similar conclusion see O' Brien and Reinecke, 'Restitutie na Terugtrede weens Kontrakbreuk' (1998) *TSAR* 561 at 569 where the authors say that it will become obvious to South African law that unjustified enrichment is the proper doctrinal basis for restitution once it is recognised that a benefit is retained *sine causa* after termination for breach because the contractual performance did not achieve its aim of discharging the performance obligation.

As part of a broader enquiry into the competition between contract and enrichment remedies in the three species of contractual failure under review, Daniel Visser has argued that restitution after termination for breach in South African law should arise uniformly in unjustified enrichment.<sup>63</sup> Visser uses the method of distinguishing between contractual and unjustified enrichment remedies outlined in the introduction to this section to conclude that restitution after termination for breach is doctrinally closer to an enrichment remedy than to a contractual one. In direct response to the asymmetry in the South African legal position, Visser argues that it is difficult to see why the nature of the contract breaker's claim for restitution should depend on whether the performance can be returned.<sup>64</sup> He argues that if it is accepted that restitution is designed to return the parties to their pre-contractual positions, then there is no difference between restitution of money and returnable benefits on the one hand, and intrinsically non-returnable benefits on the other.<sup>65</sup> And if this is so, he argues, then 'there is no compelling reason why the orthodox position should be preferable to the one proposed here.'<sup>66</sup> One very compelling reason might be that the reclassification produces undesirable results. This is not considered in Visser's work.

In addition to Birks and Joubert, Visser's analysis also helped pave the way for Hutton's analysis.

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<sup>63</sup> Another claim that comes under the reclassification hammer is *restitutio in integrum* after termination of a voidable contract. For an analysis of this claim see section 7.3.

<sup>64</sup> The aggrieved party's claim in respect of intrinsically non-restorable benefits is also enrichment-based.

<sup>65</sup> Visser, (1992) *AJ* 228. He says that this assumption is not undermined by the fact that the aggrieved party has, over and above the restitution claim, a claim for contractual damages designed to place him in the position he would have occupied had the contract been properly performed.

<sup>66</sup> Visser, (1992) *AJ* 228.

In a study comparing South African law and English law, Sally Hutton has argued that South African law should follow English law and treat restitution after termination for breach as arising uniformly in unjustified enrichment. Although she builds on Joubert and Visser's work, she explores the case for classifying restitution as an enrichment remedy in greater depth. Her method of distinguishing contractual remedies from unjustified enrichment remedies is substantially the same as that described in the introduction. She claims that there are two points of difference between contractual remedies and enrichment remedies: they have different causes of actions and different principles of recovery. Contractual remedies are said to react to a breach and aim at the fulfilment of the expectation interest engendered by the contract, either directly by specific performance or in the economic sense by damages. Enrichment remedies are said to aim at restoring the parties to the positions they occupied before the enriching event. This is achieved by returning gains to the impoverished party.<sup>67</sup> Thus, if restitution reacts to a breach and is aimed at fulfilling contractual expectations then it is contractual, whereas, if it responds to an unjustified enrichment and is aimed at restoring the parties to their positions before the enriching event, then it is based on the principles of unjustified enrichment.<sup>68</sup>

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<sup>67</sup> Hutton, (1997) *AJ* 211-2 citing Burrows 'Contract, Tort and Restitution - a satisfactory division or not' (1983) 99 *LQR* 217 at 218 and Visser, (1992) *AJ* 210. This differentiation is preferable to the one adopted by Visser as it highlights more precisely the cause of action as a distinguishing feature. Another subtle difference between their formulations is that Hutton says that the aim of enrichment remedies is to restore the parties to their positions prior to the *enriching event*, whereas Visser says that a remedy is enrichment-based if its aim is to restore the parties to their *pre-contractual positions*. Hutton's formulation is preferable since the immediate aim of the law of unjustified enrichment is to reverse gains retained unjustifiably irrespective of whether this also happens to restore the parties to their pre-contractual positions.

<sup>68</sup> Hutton, (1997) *AJ* 211-2.



(a) Establishing Unjustified Enrichment as the Cause of Action for Restitution

As stated in section 4.2.1, there are four general requirements for enrichment liability in South African law. The focus here is on the *sine causa* requirement. We saw that this requirement is often given expression with reference to the cumulative requirements of the specific enrichment actions in South African law.

The three principle enrichment actions relevant to this study are the *condictio causa data causa non secuta*; the *condictio sine causa specialis* in the form of the *condictio ob causam finitam*; and the 'action for work done and services rendered'. The *condictio causa data causa non secuta* is available for the recovery of a fixed sum of money or property that was transferred on the basis of an assumption relating to the future which failed to materialise, or subject to a modus which was disregarded or frustrated.<sup>69</sup> The *condictio sine causa specialis* in the form of the *condictio ob causam finitam* is available for the recovery of a fixed sum of money or property that was transferred in terms of a valid *causa* which has subsequently fallen away.<sup>70</sup> Finally, the 'action for work done and services rendered' lies for the recovery of the value of work done or services rendered under a contract terminated for breach.

From the requirements of these three enrichment actions, Hutton concludes that South African law recognises enrichment liability where the state of affairs contemplated as the basis or reason for the transfer has failed to materialise, or if it did materialise, failed to sustain itself.<sup>71</sup> If this is true, so Hutton's argument runs, then South African law allows recovery in unjustified enrichment in circumstances in which

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<sup>69</sup> De Vos, *Verrykingsaanspreeklikheid* (1987), 154-60 and Lotz, 'Enrichment' in *The Law of South Africa* (vol. 9, first reissue, revised by Horak, 1996), para. 85.

<sup>70</sup> Lotz, 'Enrichment' in *The Law of South Africa* (vol. 9, first reissue, revised by Horak, 1996), para. 88.

<sup>71</sup> The fact that a valid *causa* for the transfer of a benefit existed at the time of the transfer does not necessarily mean that there is also a valid *causa* for its retention. Hutton, (1997) *AJ* 214.



English law allows recovery on the basis of 'failure of consideration'. The majority view in English law is that this is one of the unjust factors which triggers an unjust enrichment claim.<sup>72</sup> The underlying idea is that where the basis for the conferral of a benefit fails, the retention of that benefit is retained *sine causa* from that moment onwards.

Drawing further on the comparison with English law, Hutton suggests two possible constructions of the *causa* for a contractual performance in terms of which the basis for that performance can be said to fail. The first identifies the *causa* as the existence of a valid primary contractual obligation to perform and the second identifies the *causa* as the assumption that the contract will be duly completed.<sup>73</sup>

#### (a i) The Causa as the Primary Obligation to Perform

On the first construction of the *causa*, a party who confers a benefit under a contract does so because he is under a valid contractual obligation. When the contract is terminated for breach, the primary performance obligations under the contract are terminated with retrospective effect.<sup>74</sup> Accordingly, although there was a valid *causa* justifying the initial transfer of the performance, this *causa* falls away as a result of the termination for breach and the benefit is thereafter retained *sine causa*.<sup>75</sup> On this construction of the *causa*, restitution after termination for breach is analogous to the *condictio sine causa specialis* in the form of the *condictio ob causam finitam*. This *condictio* is

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<sup>72</sup> Hutton, (1997) *AJ* 212-3.

<sup>73</sup> Hutton, (1997) *AJ* 213.

<sup>74</sup> Hutton, (1997) *AJ* 214-5. This excludes those cases where accrued rights survive termination.

<sup>75</sup> Hutton, (1997) *AJ* 215. This argument is premised on the view that in determining whether the *sine causa* requirement has been satisfied regard must be had not to the *causa dandi* but to the *causa retinendi*. See also Visser, (1992) *AJ* 208-10 and O'Brien and Reinecke, (1998) *TSAR* 565. This issue has not been definitely settled in South African law.

available in South African law, usually after supervening impossibility of performance, for the recovery of money or property that has been transferred in terms of a valid *causa* which has subsequently fallen away.<sup>76</sup>

(a ii) The *Causa* as the Assumption of due Completion of the Contract<sup>77</sup>

According to this construction of the *causa*, a party performs under a valid contract on the assumption that he will obtain the anticipated counter-performance.<sup>78</sup> As stated in chapter two, one of the undoubted effects of termination for breach is that both parties are released from any performance obligations arising in the future.<sup>79</sup> In a partly performed contract, the assumption that a party will receive the full counter-performances accordingly fails the moment the contract is terminated for breach.<sup>80</sup>

On this construction of the *causa*, restitution falls under the *condictio causa data causa non secuta* as this *condictio* is available for the recovery of money or property transferred on the basis of an assumption relating to the future that has failed to materialise.

The categorisation of restitution as akin to the *condictio causa data causa non secuta* is, according to Hutton, supported by both the common law and some modern cases.<sup>81</sup> In respect of the common law, Hutton says that Roman law and Roman-Dutch law used this *condictio* to facilitate recovery of a contractual performance when counter-performance failed to materialise. In light of historical research, particularly by

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<sup>76</sup> Hutton, (1997) *AJ* 214.

<sup>77</sup> It is more accurate to refer to a contractual obligation here than to the contract as a whole.

<sup>78</sup> Hutton, (1997) *AJ* 214.

<sup>79</sup> This is the prospective effect of termination described in chapter 2.

<sup>80</sup> This, of course, excludes rights that survive termination for breach by being accrued contractual rights.

<sup>81</sup> Hutton, (1997) *AJ* 216.

Evans-Jones and De Vos, this is interpretation of the *condictio causa data causa non secuta* is open to question.<sup>82</sup>

Leaving this historical difficulty aside, the above analysis leads Hutton to conclude that

‘[t]he remedy of restitution responds to this unjust enrichment rather than to the breach which is its more remote cause. This is evident from the fact that, unlike a contractual remedy (like damages) which is activated by a breach of contract and becomes available to the innocent party immediately on breach, restitution becomes available only on the termination of the contract, at the point when the basis for the transfer of the performance in question truly fails. ... In that it reacts to an unjust enrichment, restitution after termination for breach displays the first of the characteristics identified above as distinguishing an enrichment from a contractual remedy.’<sup>83</sup>

#### (b) Purpose of Restitution after Termination for Breach

The second part of the test used by Hutton to distinguish contractual and enrichment remedies refers to the manner in which a remedy responds to a particular factual matrix. Hutton follows Visser’s argument that restitution (and counter-restitution) aims not to fulfil the goals created by the parties’ contractual intentions but rather to reverse the effects thereof. Accordingly, ‘in function too, ...restitution bears closer resemblance to an enrichment rather than a contractual remedy.’<sup>84</sup>

From this Hutton concludes that, having regard to

‘... its cause of action and underlying principle of recovery, restitution after termination for breach is best categorised as an enrichment remedy: another species of that genus of enrichment actions which provides for the return of a

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<sup>82</sup> For the views of De Vos and Evans-Jones see section 4.4.3 below. See also Du Plessis, ‘Towards a rational structure of liability for unjustified enrichment: Thoughts from two mixed jurisdictions’ (2005) *SALJ* 149 where he notes that the *condictio causa data causa non secuta* has limited application in modern South African law. According to Du Plessis, it is not available if the *purpose* of the transfer is the aim of fulfilling an existing contractual obligation. See also Lotz, ‘Enrichment’ in *The Law of South Africa* (vol. 9, first reissue, revised by Horak, 1996), para. 85.

<sup>83</sup> Hutton, (1997) *AJ* 221.

<sup>84</sup> *Ibid.*

benefit in circumstances where the basis or *causa* for the transfer thereof has failed.<sup>85</sup>

Finally, Hutton argues that her solution will avoid an indefensible asymmetry in the current South African law.<sup>86</sup>

The importance of Hutton's argument is that it establishes that it is theoretically possible to classify restitution as an enrichment remedy. Furthermore, she has clearly articulated the doctrinal reasons for doing so.

(c) Hutton and the Transformation Theory

The transformation theory does not stand in the way of the argument that restitution after termination for breach ought to be an enrichment remedy. That said, it does no useful work in the argument either. It is equally possible to sustain Hutton's argument and say that termination for breach completely obliterates the contractual nexus. This, however, would pose doctrinal problems for contractual damages and should, for that reason, be avoided.

(vi) *Hector MacQueen: The 1994 View*

At almost the same time that Visser and Hutton were mounting their argument in South African law, Hector MacQueen was advancing a similar argument in Scots law. MacQueen's starting point, like that of Hutton and Visser, is the conceptual difference between enrichment and contractual remedies described in the introduction.<sup>87</sup>

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<sup>85</sup> Hutton, (1997) *AJ* 222.

<sup>86</sup> Hutton, (1997) *AJ* 207. For a similar claim see also O'Brien and Reinecke, (1998) *TSAR* 568.

<sup>87</sup> MacQueen, (1994) *JR* 143-4.

Mutuality is fundamental to MacQueen's analysis. Mutuality is said to explain two points about restitution after termination for breach: first, why restitution should follow termination for breach and secondly, why the retention of a performance after termination for breach makes the enrichment unjustified.

As stated in section 3.3.2, mutuality underpins the aggrieved party's right to withhold his contractual performance until the contract breaker has properly performed his (reciprocal) contractual obligation.<sup>88</sup> According to MacQueen, saying that one party may withhold his performance when the other has not performed in accordance with the contract is not greatly divergent from saying that where one party fails to perform, that party must return any performance already received.<sup>89</sup> If this is correct, so the argument runs, then restitution should follow termination for breach because the right of retention necessarily implies that the anticipated proper counter-performance was not received.

For the same reason, MacQueen argues that the mutuality principle explains why a benefit is retained *sine causa* after termination for breach.<sup>90</sup> According to this line of reasoning, a party performs under the contract in order to receive the anticipated counter-performance. In a partly performed contract, it is clear that the counter-performance will not be forthcoming once the contract has been terminated for breach. Accordingly, the purpose of the transfer fails from that moment onwards. MacQueen argues that any performance rendered prior to termination for breach in these

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<sup>88</sup> The point about the reciprocity of obligations must now be read in light of *Hoult v Turpie* 2003 SCLR 577. This case is discussed in section 3.3.2(i).

<sup>89</sup> MacQueen, (1994) JR 143. Evans-Jones also justifies the right to restitution in a similar way when he says that the aggrieved party should not be denied the benefit of the mutuality principle simply because he happened to have performed before termination. Evans-Jones, 'The Claim to recover what was transferred for a lawful purpose outwith contract (*condictio causa data causa non secuta*)' (1997) AJ 139 at 168.

<sup>90</sup> MacQueen, (1994) JR 144.

circumstances can be recovered with in Scots law with the *condictio causa data causa non secuta*.<sup>91</sup>

Although this argument is substantially the same as Hutton's argument, MacQueen, perhaps somewhat surprisingly, falls short of saying that restitution after termination for breach ought to arise uniformly in unjustified enrichment. Despite a number of statements endorsing the enrichment nature of restitution, MacQueen hedges his bets along the lines that when the courts consider restitution claims, they *may* have recourse to enrichment *techniques* - such as defining what a benefit is and when a recipient of a benefit ought to be able to use the change of position defence.<sup>92</sup>

#### (vii) *Scottish Law Commission*

The Scottish Law Commission has also advocated that restitution after termination for breach ought to be an enrichment remedy.<sup>93</sup> Following on from some of

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<sup>91</sup> MacQueen, bowing in the historical direction of Evans-Jones, says that while this may not be the classical *condictio causa data causa non secuta*, this interpretation of the *condictio* is 'not manifestly unjust or inconsistent with [unjustified enrichment] principles.' MacQueen, (1994) JR 149. See also Gloag and Henderson, *The Law of Scotland* (2001), para. 28.04. For Evans-Jones' view of this *condictio* see section 4.4.3(ii)(b) below.

<sup>92</sup> The following two statements from MacQueen, (1994) JR 137 justify a categorical reading of MacQueen's argument. (i) 'It is argued that both the innocent party and the contract-breaker can have enrichment claims, generally following the termination of the contract for breach. In this the position is rather similar to that prevailing on frustration of contract.' (137) [The current position in Scotland is that the claims designed to redress the economic imbalances between the parties after frustration are enrichment actions. See section 7.2.2(i)] and (ii) '[i]f ... it is accepted that the restitution claim is based upon unjustified enrichment, then it becomes possible to discuss not only the claim but also possible defences in terms of enrichment law.' (144) The following three statements support my claim that MacQueen hedges his bets. (i) 'But there are some instances in the case law where certain questions *may* be better answered through enrichment *techniques* than ordinary contractual ones.' (138) [my emphasis]; (ii) '[i]t has already been argued ... that, whether or not the recovery springs from contract, rescission entails reversal of the unjustified enrichment of both parties...' (165); and (iii) '[t]he argument ... has been that the principles of unjustified enrichment *can* support the claim of a contract-breaker to recovery for his performance where he is precluded from recovery under the contract.' (165).

<sup>93</sup> Scottish Law Commission, *Remedies for Breach of Contract* (Discussion Paper No. 109, 1999), para. 4.44. Eric Clive also argues that restitution ought to be an enrichment remedy. Clive, *Judicial Abolition of the Error of Law Rule and its Aftermath*, (Appendix to Scottish Law Commission, Discussion Paper No. 99, 1996), rule 5(1)(d) and rule 7(2)(b).

MacQueen's analysis, the Scottish Law Commission argues that as many of the problems that arise in this area - what counts as a benefit (an enrichment), the measure of recovery, possible bars to recovery and equitable defences - are best dealt with by enrichment law, there is no need to do this work twice, once in enrichment and once in contract.<sup>94</sup>

#### 4.4.3 Restitution is a Contractual Remedy

##### (i) *Introduction*

Whereas the argument that restitution ought to be classified as an enrichment remedy is well developed, the contractual explanation of restitution remains relatively less well explored. This contractual explanation has been defended on historical grounds and with reference to the transformation theory.

##### (ii) *Historical Approach*

##### (a) Wouter de Vos

Writing from the standpoint of South African law, Wouter De Vos has argued that the availability of the *condictio causa data causa non secuta* after termination for breach in Roman law was intimately connected to the distinction between innominate real contracts and consensual contracts.<sup>95</sup> The innominate contracts of Roman law were not

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<sup>94</sup> Scottish Law Commission, *Remedies for Breach of Contract* (Discussion Paper No. 109, 1999), para. 4.44.

<sup>95</sup> De Vos, *Verrykingsaanspreeklikheid* (1987), 10-20; 62-6 and 156-8.

enforceable by raising a legal action. Whilst counter-performance could not be obtained, Roman law allowed the party who had performed under the contract to recover this performance by means of the *condictio causa data causa non secuta*. This *condictio* was based on the principles of unjustified enrichment and was used to recover property transferred for a *causa* that failed to materialise. After the reception of Roman law in Europe, the principle of *pacta sunt servanda* established that all agreements seriously intended became binding on agreement alone. The result of this was that in Roman-Dutch law the innominate real contracts of Roman law were treated in the same way and enforced by the same remedies as the consensual contracts. The distinction between innominate real contracts and consensual contracts still applied in Roman-Dutch law to regulate the recovery of benefits conferred prior to termination for breach. In respect of contracts that would have been classified as innominate real contracts under Roman law, Roman-Dutch law continued to grant the aggrieved party the right to claim the return of a contractual performance by way of the *condictio causa data causa non secuta*. In respect of contracts that would have been classified as consensual contracts in Roman law, Roman-Dutch law granted the aggrieved party similar relief by way of a *lex commissoria*, the *actio empti* or the *actio redhibitoria*.<sup>96</sup>

In De Vos's view, these specific actions available to terminate a contract and to claim restitution in contracts that would have been regarded as consensual in Roman law were considered to be contractual remedies.<sup>97</sup> After South African law developed a generalised right to terminate a contract for breach, the distinction between consensual contracts and innominate real contracts was abolished for the purposes of regulating restitution after termination for breach. According to De Vos, this development meant

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<sup>96</sup> De Vos, *Verrykingsaanspreeklikheid* (1987), 156.

<sup>97</sup> *Ibid.*



that the *condictio causa data causa non secuta* has no place in modern South African law after termination for breach and as a result, restitution ought to be regarded as a contractual remedy in all instances where the claim is for restitution of money or returnable benefits in kind.<sup>98</sup>

Although De Vos's view has had wide support, it has not gone uncontested. While it is generally accepted that restitution after termination of innominate real contracts of the *do ut das* variety was based on unjustified enrichment in both Roman law and Roman-Dutch law, van der Walt has argued that it is not clear that restitution after the termination of a consensual contract in Roman law was regarded as contractual. According to van der Walt, there is equivalent historical support for the conclusion that restitution after termination for breach is based either on unjustified enrichment or simply upon the natural operation of termination.<sup>99</sup>

Furthermore, Hutton points out that even if it is accepted that the actions available under Roman law and Roman-Dutch law for the recovery of benefits conferred under contracts other than innominate real contracts were contractual in nature, the most one can conclude from this is that the common law authority as to the juristic basis of restitution is equally divided.<sup>100</sup> As a matter of logic, therefore, De Vos's conclusion could quite easily have gone the other way.<sup>101</sup> Accordingly, the argument that restitution of money and returnable benefits in kind is contractual is not supported by

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<sup>98</sup> *Ibid.*

<sup>99</sup> Van der Walt, 'Die Grondslag van die Terruggawepelig ten opsigte van wat reeds gepresteer is waar na kontrakbreuk teruggetree word – n kwessie van metode?' (1985) 48 *THRHR* 5 at 13-4 cites, *inter alia*, the following text in support of his argument: Voet 19.1.3 explaining D19.1.29 merely states that the *actio empti* is available in certain circumstances for recovery of the purchase price after termination for breach of the contract of sale. Importantly, Voet does not state that this is a contractual remedy. Indeed certain South African writers contend that the *actio redhibitoria* is, in principle, best regarded as an enrichment action. See Visser, (1992) *AJ* 225 and Hutton, (1997) *AJ* 210.

<sup>100</sup> Hutton, (1997) *AJ* 210 and Van der Walt, (1985) 48 *THRHR* 14.

<sup>101</sup> Hutton, (1997) *AJ* 210.

the fact that the *condictio causa data causa non secuta* is not available after termination for breach in modern law.

(b) Robin Evans-Jones

A similar historical argument is found in Scots law. Robin Evans-Jones builds on the above history of the *condictio causa data causa non secuta* to argue that this *condictio* is by definition not applicable after termination for breach.<sup>102</sup> It is well established that the *condictio causa data causa non secuta* is only available to recover a performance rendered where the purpose (*causa*) of that transfer has failed.<sup>103</sup> In the civilian tradition, a party makes a transfer under a valid contract in order to fulfil a contractual obligation (*causa solvendi*). If the contractual obligation is valid, transfers made prior to termination will accordingly always achieve their purpose. It follows that restitution after termination for breach cannot be an instance of the *condictio causa data causa non secuta* as this *condictio* is by definition only available where the purpose of a transfer has failed.<sup>104</sup>

It is necessary to clarify one potentially ambiguous point in this argument. When Evans-Jones refers to the purpose of performing under a contract, he must mean the 'aim' of discharging a contractual obligation and not the actual fact of discharging it. If this were not the case, then the *causa* would be *non secuta* where the contract breaker rendered defective performance since this would not discharge his contractual

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<sup>102</sup> Evans-Jones has developed this argument in a series of contributions. See Evans-Jones, 'Unjust Enrichment and the Third Reception of Roman Law in Scotland' (1993) 109 *LQR* 663; Dieckmann and Evans-Jones, 'The Dark Side of *Connelly v Simpson* (1995) *JR* 90; Evans-Jones, (1997) *AJ* 139; Evans-Jones, 'Roman Law in Scotland and England' (1999) 115 *LQR* 605; Evans-Jones and Kruse, 'Failure of Consideration' in Johnston and Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 128 and Evans-Jones, *Unjustified Enrichment* (2003), paras. 4.02-04.

<sup>103</sup> Evans-Jones, (1997) *AJ* 140.

<sup>104</sup> Evans-Jones, (1997) *AJ* 140-1.

obligation.<sup>105</sup> From Evans-Jones' point of view, the undesirable result would be that the contract breaker would be able to use the *condictio causa data causa non secuta* to recover his defective performance.<sup>106</sup>

Like De Vos, Evans-Jones uses this as one of his arguments that restitution after termination for breach ought to be regulated by contract law instead of the law of unjustified enrichment.

Although the historical merits of this argument are well established, modern Scots law has not interpreted the ambit of the *condictio causa data causa non secuta* in this way. There is clear authority in Scots law for interpreting the purpose (*causa*) of a contractual transfer to mean 'failure of consideration' where the consideration is taken to mean the receipt of the anticipated counter-performance. This is most clearly seen in *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. Ltd*<sup>107</sup> where the *condictio causa data causa non secuta* was used to recover what was transferred under a valid but subsequently frustrated contract.<sup>108</sup> As a result of the uncertainty surrounding *Connelly v Simpson*, it is unclear whether this *condictio* applies in cases where the contract has been terminated for breach. This issue will be discussed in section 5.3.1(i)(b ii).

(iii) *Restitution is Contractual because of the Transformation Theory: Gerhard Lubbe*

In explaining the contractual nature of restitution with reference to the transformation theory, Lubbe makes two essential claims. First, the retention of a

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<sup>105</sup> The same would also hold true in cases where the aggrieved party renders part performance under the contract. Zimmermann and du Plessis, 'Basic Features of the German Law of Unjustified Enrichment' (1994) 2 RLR 14 at 21.

<sup>106</sup> Zimmermann and du Plessis, (1994) 2 RLR 21.

<sup>107</sup> 1923 SC (HL) 105.

<sup>108</sup> For a full discussion see chapter 7.

benefit is not held *sine causa* after termination for breach because termination leaves the contractual nexus in tact (albeit with a transformed content).<sup>109</sup> Lubbe uses the fact that the contractual nexus survives termination for breach to justify the contractual nature of restitution (at least in respect of money and returnable benefits).

Hutton attacks this argument on two grounds. First, she argues that there is not sufficient evidence that a contractual nexus survives termination for breach. The existence of secondary obligations to make restitution and to pay damages, she argues, does not itself support the existence of a continued contractual nexus as a contractual nexus only consists of obligations that arise *ex consensu* (i.e those obligations which derive from the formation of the contract).<sup>110</sup> In her view, the question whether the contractual nexus survives termination is essentially the same as the question whether the duty to restore arises *ex contractu* or in unjustified enrichment.<sup>111</sup> It is clear that Hutton believes it is the latter.

Hutton's second line of attack concerns the *sine causa* requirement. Assuming that the contractual nexus survives termination, Lubbe's argument is that this precludes the claim for restitution from meeting the *sine causa* requirement. On this view, the *causa* for a contractual performance is the contractual nexus itself.<sup>112</sup> In Hutton's opinion, this is less convincing than the view that the *causa* for the contractual performance is either the valid contractual obligation to perform under the contract or the assumption of due completion of the contract.

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<sup>109</sup> Lubbe, 'The Assessment of Loss upon Cancellation for Breach of Contract' (1984) 101 *SALJ* 616 at 637.

<sup>110</sup> Hutton, (1997) *AJ* 219. For a similar type of argument see also O'Brien and Reinecke, (1998) *TSAR* 562-3. The authors argue that the idea of the transformation theory is not associated with the intention of the parties because, they say, contracts are concluded with a view to fulfilment and not with a view to their premature termination. For an argument that termination extinguishes all obligations that are affected by termination see Van der Merwe *et al.*, *Contract General Principles*, (2003), 377.

<sup>111</sup> Hutton, (1997) *AJ* 219.

<sup>112</sup> Lubbe, (1984) 101 *SALJ* 637.

Lubbe's second point is that restitution is a necessary step towards calculating positive *interesse* damages. Although it is necessary to take account of the aggrieved party's 'restitution' interest in calculating damages, O'Brien and Reinecke have pointed out that this is not a convincing reason for viewing restitution as a contractual remedy. Lubbe's argument presupposes that as a matter of doctrine, restitution and damages ought to have the same doctrinal basis and that damages and restitution are inextricably linked as two components of one remedy or at least so closely connected that they cannot be separated. The authors rightly point out that this does not explain why the contract breaker is also entitled to restitution without, obviously, ever having a damages claim.<sup>113</sup> This leads the authors to the conclusion that there is no practical or doctrinal impediment to regarding damages and restitution as having separate doctrinal bases. Indeed, this is the current position in South African law where restitution of inherently non-returnable benefits is considered to be an enrichment remedy.

Although Lubbe's use of the transformation theory to justify a contractual explanation of restitution strains under the weight of the above criticisms, this is not the end of the matter.<sup>114</sup> In my view, the transformation theory can be made to do useful explanatory work if it turns out that restitution ought to be regulated by contract law.

One way of making sense of the distinction between primary and secondary obligations is to see it as providing a theoretical tool to distinguish between two types of *contractual* rights. The primary contractual rights are those which aim at the performance of a contract while the secondary contractual rights are those which aim at the winding up of a contract after termination for breach. Put another way, restitution is a contractual remedy precisely because it is the secondary right that arose after the

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<sup>113</sup> O'Brien and Reinecke, (1998) *TSAR* 567-8.

<sup>114</sup> For a hedged concession see Lubbe, 'Voidable Contracts' in Zimmermann and Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996), 261 at 286 n241.

aggrieved party terminated the contract for a breach of his primary contractual right to performance.<sup>115</sup> This clearly cuts across the arguments made by those in the enrichment camp who view contractual remedies as inextricably linked to the parties' contractual intentions. Although their view of the division of obligations and the way of differentiating between contractual and enrichment remedies has predominated over the last decade, it can be argued that there is more to the story of contractual rules than binding promises and fulfilling contractual expectations.<sup>116</sup> Indeed, there is something counter-intuitive about allowing contract law to determine when a contract is formed; when it is breached; how it is discharged by performance; when damages can be claimed; and what quantum of damages are recoverable and then to remove from its ambit an integral part of the winding up process after termination for breach.

(iv) *Restitution is Contractual because of the Source of the Obligation to Restore*

(a) Johannes Dieckmann and Robin Evans-Jones

Johannes Dieckmann and Robin Evans-Jones have argued that restitution is contractual because

[t]he source of the obligation to restore ... arises from fully valid contracts and it therefore by reference to the law of contract that the solution for these cases ... is best found. Under this approach restitution is merely one of a range of responses, including damages and specific implement, provided by the law of contract.<sup>117</sup>

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<sup>115</sup> For a similar type of argument see Perillo, 'Restitution in a Contractual Context' (1973) 73 *Columbia LR* 1208 at 1213-6. For a useful discussion of the theory underlying the distinction between primary and secondary rights see Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' (1998) 57 *CLJ* 301 at 319-26.

<sup>116</sup> See for example Atiyah, 'Contracts, Promises and the Law of Obligations' in Atiyah (ed), *Essays on Contract* (1986), 10. See also Hogg, *Obligations* (2003), para. 4.101.

<sup>117</sup> Dieckmann and Evans-Jones, (1995) *JR* 100. De Vos, in a similar vein, argues that the secondary obligations of the transformation theory come from the *naturalia* of the contract. De Vos, *Verrykingsaanspreklikeid* (1987), 356. See also Van der Merwe *et al.*, *Contract: General Principles*, (2003), 382

This argument is closely linked to the use of the transformation theory to explain the contractual nature of restitution and, as we shall see below, probably best explains MacQueen's analysis in 1997.

(b) Hector MacQueen: The 1997 View

Although MacQueen was not unequivocal about the doctrinal basis of restitution after termination for breach in his 1994 article, the tenor of the argument shows that he inclines – albeit in a slightly hedged way – towards an enrichment view of this remedy.<sup>118</sup> In 1997, as part of a broader enquiry into the relationship between contract and unjustified enrichment, MacQueen inclines – this time, hedging in the opposite direction – towards a contractual view of restitution after termination for breach.<sup>119</sup> This is evident from the fact that this remedy is dealt with under a heading entitled 'Contract Rules which Prevent Unjustified Enrichment'.<sup>120</sup> The central idea is that the prevention of unjustified enrichment is one of the aims of contract law. In other words, just because a remedy aims to prevent an unjustified enrichment, this does not necessarily mean that the remedy is enrichment in nature. MacQueen does, however, go on to say that enrichment *considerations* might still be relevant.<sup>121</sup> Presumably, this means that the courts might profitably look to relevant enrichment

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where the authors say that the traditional view is that restitution is based on the *naturalia* of the contract and is therefore a contractual remedy. Although the authors supported the contractual analysis of restitution (at least in respect of money benefits and returnable benefits in kind) in the first edition of their book, they now support the enrichment analysis. See respectively, Van der Merwe *et al.*, *Contract General Principles*, (1993), 293 and Van der Merwe *et al.*, *Contract General Principles*, (2003), 382.

<sup>118</sup> See section 4.4.2(vi).

<sup>119</sup> MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts* (1997), 199.

<sup>120</sup> MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts* (1997), 216.

<sup>121</sup> MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts* (1997), 217.



concepts without necessarily importing wholesale enrichment analysis. For example, the courts might look to enrichment law to assist in the analysis of what constitutes a benefit without necessarily opening the door to the change of position defence.

Although MacQueen appears to come down firmly in favour of the view that restitution is contractual, he argues, perhaps somewhat inconsistently, that *quantum meruit* claims – which raise the same issues as restitution claims – ought be classified as enrichment actions. This is justified, he says, by the twin facts that these claims aim to prevent unjustified enrichment and involve a departure from the terms of the contract.<sup>122</sup>

Two points are worth noting about MacQueen's analysis. First, although this is not made explicit, MacQueen appears to be justifying his contractual view of restitution after termination for breach along similar lines to Dieckmann and Evans-Jones. Secondly, by arguing that restitution is contractual even though its aim is to prevent an unjustified enrichment MacQueen is implicitly making an important concession: that he no longer advocates distinguishing between contractual and enrichment remedies according to the approach outlined in the introduction to section 4.4.2.

#### 4.4.4 Restitution: Contract, Unjustified Enrichment or Sometimes Contract and Sometimes Unjustified Enrichment?

##### (i) *Introduction*

The above exposition demonstrates that both the contractual and the enrichment analysis of restitution after termination for breach are doctrinally defensible.

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<sup>122</sup> MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts* (1997), 222.



This poses a difficult question: how should a legal system choose between two doctrinally defensible solutions? This is especially acute when the courts and some academics are strongly opposed to each other. Van der Walt rightly warns that researchers must tread cautiously in these circumstances.<sup>123</sup> What follows is an assessment of the various approaches considered above and a theoretical suggestion as to how, in my view, a legal system ought to choose between doctrinally defensible solutions.

(ii) *A Question of Methodology*

(a) *Historical Approach*

One way of tackling the doctrinal basis of restitution is to consider the history of the remedy. We saw that the doctrinal basis of restitution was not satisfactorily resolved in Roman law, Roman-Dutch law or Scots law during the period of the institutional writers. This is unsurprising as the lack of a generalised right to terminate a contract for breach limited the respective lawyers from considering the consequences of termination for breach on the requisite level of generality.<sup>124</sup> This historical approach is accordingly of limited value in this instance.

Another variation of the historical argument is used by De Vos and Evans-Jones. In order to support their claim that restitution is based on the law of contract, the authors focused on the history and scope of the *condictio causa data causa non secuta*. The argument is that it is historically inaccurate to use this *condictio* after termination for breach. Although the historical development of this *condictio* is well established, modern

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<sup>123</sup> He also (jokingly) suggests that the researcher should think carefully about choosing another topic for his labour. Van der Walt, (1985) 48 *THRHR* 6.

<sup>124</sup> See O'Brien and Reinecke, (1998) *TSAR* 561.

Scots law has applied this *condictio* after contractual failure. South African law still appears to follow a restrictive approach.<sup>125</sup> South African law does, however, have the *condictio sine causa specialis* in the form of the *condictio ob causam finitam* which can regulate restitution after termination for breach.<sup>126</sup> This *condictio* is available for restitution of a transfer that was made on the basis of an initially valid *causa* that has subsequently fallen away.

It was established by authors in the enrichment camp that it is at least theoretically possible for one of the established enrichment actions to regulate restitution after termination for breach. This is strengthened by a move towards a more generalised approach to enrichment liability in both South African and Scots law. According to this generalised approach, all that is required is that the general requirements for enrichment liability are present.<sup>127</sup> As a result, the importance of the precise historical scope of a particular enrichment action diminishes in favour of a more principled and conceptual approach.

In my view, the above reasons demonstrate that the argument for the contractual analysis of restitution is not sufficiently supported by a consideration of the history of restitution itself or by a consideration of the historical development of one specific enrichment action. This analysis also highlights a potential deficiency with using the history of a particular remedy as the threshold criterion for solving doctrinal problems.

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<sup>125</sup> See Du Plessis, 'Towards a rational structure of liability for unjustified enrichment: Thoughts from two mixed jurisdictions' (2005) *SALJ* 149.

<sup>126</sup> This *condictio* is applied to reverse transfers made under a valid *causa* that has subsequently fallen away.

<sup>127</sup> See *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at 202. The case involved a claim to redress the economic imbalances after the termination of a contract as a result of supervening impossibility of performance (frustration). In referring to the choice between the *condictio ob causam finitam* and the *condictio causa data causa non secuta* and specifically to Evans-Jones' argument about the latter, Navsa JA and Hefer AJA stated that 'the essential point is that [the] claim is covered by one or the other remedy for unjust enrichment. It follows that to assess that claim one has to consider whether the ... general enrichment elements are present.'

(b) Abstract Taxonomic Approach

The views of those in the enrichment camp are united by their reliance on abstract taxonomic or doctrinal reasons. By this it is meant that their arguments rest on a particular way of carving up the law of obligations or on matters relating to the internal workings of unjustified enrichment. These arguments have established that it is theoretically possible to treat restitution as an enrichment remedy. Interestingly, Collins has suggested that the recent surge of interest in the breakdown of contracts is due to ‘the long delayed impact of the Realist insight that the content of primary obligations does not determine the content of the secondary obligations.’<sup>128</sup> In other words, just because a benefit was transferred pursuant to a valid contract, there is no reason why the remedies after the termination of that contract cannot be based on the law of unjustified enrichment. What is clear from the literature is that the enrichment lawyers have used this awareness of the ‘loosening of the ties between primary and secondary obligations’ to argue that restitution after termination for breach should arise uniformly in unjustified enrichment.<sup>129</sup> The irony is that their arguments presuppose a strong, enrichment-based link between the very same primary and secondary obligations. Although these arguments have a certain compelling internal logic, this does not paint over the indeterminacy between the primary and secondary obligations. In other words, there appears to be no argument based on prior logic which we can use to determine the juristic basis of restitution after termination for breach.<sup>130</sup> Indeed, we saw that the argument that restitution is enrichment-based does not preclude the finding that

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<sup>128</sup> Collins, ‘Review of Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences*’ (1998) 2 *Edin LR* 368.

<sup>129</sup> Collins, (1998) 2 *Edin LR* 369.

<sup>130</sup> For a criticism of the use of the taxonomic divisions in the law of obligations to justify legal rules see Cockrell, ‘The Hegemony of Contract Law’ (1998) 115 *SLJ* 286 at 304-8.

restitution can be contractual. It should not come as a surprise that there are two doctrinal alternatives which could govern restitution after termination for breach since it is rare for arguments based exclusively on abstract taxonomic doctrine to yield definitive answers to complex legal problems.<sup>131</sup>

The same concerns can be raised against Lubbe's use of the transformation theory to support a contractual explanation of restitution. Even if the analysis of the effects of termination for breach on the contractual nexus points towards a distinction between primary and secondary obligations, this is not a sufficiently good reason for classifying restitution as contractual. The argument suffers the same deficiencies as the 'abstract taxonomic' argument advanced by the enrichment lawyers. The crucial point is that in deciding on the proper doctrinal basis of restitution, it is vitally important that the tail does not wag the dog.

### (c) Comparative Approach

A brief comparison with the position in other countries supports the claim that there is nothing self evidently correct about treating restitution as arising in either the law of contract or the law of unjustified enrichment.

The position in English law is complex. The majority of English academics think that unjust enrichment is best organised around a system of unjust factors. According to this approach, a specific factor is required to trigger an enrichment claim. One of the unjust factors, relied upon by Hutton in mounting her argument, is 'failure of consideration'. Failure of consideration is tested by looking at whether the party

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<sup>131</sup> For a colourful and cutting critique of the abstract doctrinal approach see Campbell, 'Review Article, *Classification and the Crisis of the Common Law*' (1999) 26 *JLS* 369.

claiming restitution of money has received the bargained-for counter-performance.<sup>132</sup> If this bargained for counter-performance has not been forthcoming, then the benefit can be reclaimed with an enrichment action.

A number of points are important to note. First, although an enrichment analysis of failure of consideration is the majority view amongst academics, this view is not universally held.<sup>133</sup> Secondly, those who favour an enrichment analysis of failure of consideration have done so for abstract taxonomic reasons and are subject to the same criticisms raised directly above. Thirdly, the whole system of unjust factors has recently been called into question by a combination of the House of Lords decision in *Kleinwort Benson Ltd v Lincoln City Council*<sup>134</sup> and Sonia Meier's comparative work. Indeed, such was the force of Meier's arguments that it has led Birks to abandon his original scheme of unjust factors in favour of the civilian starting point. This approach asks whether there is any legal ground for justifying the enrichment.<sup>135</sup>

This new paradigm requires a reworking of the 'failure of consideration' unjust factor as the enrichment-based explanation for restitution. In cases where a contract has been terminated for breach, the requirements of failure of consideration are met when the anticipated counter-performance is not received.<sup>136</sup> In Birks' new scheme, the failure of contractual reciprocation is not the direct trigger of an unjust enrichment claim. Instead, it allows the aggrieved party to terminate the contract which in turn invalidates (retrospectively) the contractual obligation to perform and the 'invalidity of the

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<sup>132</sup> Burrows, *The Law of Restitution* (2002), 324ff.

<sup>133</sup> See for example Jaffey, *The Nature and Scope of Restitution: Vitiating Transfers, Imputed Contracts and Disgorgement* (2000), 54-64 and Jaffey, 'The Restitutionary Conditional Transfer Analysis and the Death of Contract' (1998) 2 *Edin LR* 23. For an insightful and critical review of Jaffey's argument see Barker, 'Review Article, *The Nature and Scope of Restitution*' (2001) 9 *RLR* 232.

<sup>134</sup> [1999] 2 AC 349 AC (HL).

<sup>135</sup> Birks, *Unjust Enrichment* (2003), 38-9.

<sup>136</sup> Burrows, *The Law of Restitution* (2002), 324ff.

obligation constitutes the absence of explanatory basis which renders the enrichment unjust.<sup>137</sup> Although this briefly attempts to explain how failure of consideration fits into this new scheme, some uncertainty remains.

The upshot is that English law does not decisively illuminate the path to doctrinal clarity.

German law also provides an interesting point of comparison. Until the recent revisions of the code, restitution after termination for breach had a dual doctrinal basis. The old regime was complex. The consequences of termination were generally found in the contract rules §346-361 of the *BGB*. Dannemann notes that, surprisingly, §346-361 had been drafted for the much rarer case of a contractually stipulated right to termination. It is only by reference to §327 that these provisions applied, in addition, to the statutory right to terminate. The problem was that §327 contained a rather oblique second sentence, which said that if termination of a contract has been declared against a party who is not to blame, this party is liable under the more lenient rules of unjustified enrichment rather than the stricter contractual rules.<sup>138</sup> The interpretation of this sentence has caused problems. The courts, however, applied its rationale, which was obviously to benefit the aggrieved party, and held that the aggrieved party is liable in terms of the more lenient rules of unjustified enrichment.<sup>139</sup> The net result was that the doctrinal basis of restitution differed depending on whether the aggrieved party or the

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<sup>137</sup> Birks, *Unjust Enrichment* (2003), 127.

<sup>138</sup> There is generally stricter liability under the contractual provisions than under the enrichment provisions (§813ff) in that change of position is not recognised as a defence under the former. Dannemann, 'Restitution for Termination of Contract in German Law' in Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (1997), 129 at 144.

<sup>139</sup> Zimmermann notes, however, that some commentators are prepared to accept the literal meaning of the second sentence in §327. This effectively means that this section has no scope with the result that both the aggrieved party and the contract breaker are liable under the stricter contractual rules of §346ff. Zimmermann, 'Restitution after Termination for Breach of Contract in German Law' (1997) 5 *RLR* 13 at 15.

contract breaker was the restitution claimant.<sup>140</sup>

The legal position under the old law can be summarised as follows: if a contract was terminated as a result of a right stipulated in the contract, then restitution occurred entirely under the law of contract (§346-361), while if termination occurred in terms of the statutory right, then a mixed contractual (§ 346-361) / unjustified enrichment (§813 *et seq*) model applied depending on whether the claimant was the contract breaker or the aggrieved party.<sup>141</sup>

Recent reforms have significantly simplified the position in German law. Whilst both parties are still under a duty to restore performances received prior to termination for breach, the doctrinal basis has now changed. The law of unjustified enrichment no longer regulates restitution after termination for breach in any circumstances. Instead, restitution is governed by a set of specific contractual rules (§ 346ff). Although this can be seen as a set of special *sui generis* rules, Zimmermann says they rest on the following juristic basis:

[d]octrinally, the existence of this specific restitution regime has always been justified by pointing out that termination does not remove the entire contract (be it *ab initio* or *ex nunc*) and does not, therefore, create a situation where the performance can be said to have been made 'without legal ground' [as is required in German law for an unjustified enrichment claim], but instead transforms a relationship aiming at the implementation of the contractual programme originally agreed upon into a contractual winding-up relationship.<sup>142</sup>

In contrast to the majority view of English law, German law has opted for a specific contractual regime to regulate restitution after termination for breach.

This brief comparative picture demonstrates that legal systems can, and in fact do, legitimately differ in what they consider to be the proper doctrinal basis of

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<sup>140</sup> Dannemann, 'Restitution for Termination of Contract in German Law' in *Failure of Contracts* (1997), 131.

<sup>141</sup> *Ibid.*

<sup>142</sup> Zimmermann, 'Remedies for Non-Performance: the revised German law of obligations, viewed against the background of the Principles of European Contract Law' (2002) 6 *Edin LR* 271 at 306.



restitution after termination for breach. This demonstrates that both in logic and in practice restitution after termination for breach can arise in either contract or unjustified enrichment. Accordingly, if there is no *a priori* way to determine whether restitution should be based on the principles of contract, unjustified enrichment or sometimes on the principles of contract and sometimes on the principles of enrichment, then we need to find some alternative method for making this choice.

(d)      An Approach based on the Principles Underlying the Remedy and the Consequences of Classifying a Remedy According to a Set of Doctrinal Rules

The above analysis demonstrates that neither the historical, the abstract taxonomical/doctrinal or the comparative approach yielded a satisfactory answer to the question regarding the proper doctrinal basis of restitution after termination for breach. The aim of this section is to set out a theoretical framework that, in my view, ought to be used whenever a legal system has a choice between two doctrinally defensible alternatives.<sup>143</sup> This framework will be used in the following two chapters to resolve the doctrinal debate about the basis of restitution after termination for breach. This framework will also be used in the final substantive chapter to suggest the proper doctrinal basis of the claims under review in the other two species of contractual failure.

In my view, the choice between doctrinal alternatives ought to be made after

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<sup>143</sup> It is important to note that we are dealing here with a decision that a legal system must make between viewing restitution as being regulated by the law of contract, the law of unjustified enrichment, or sometimes by the law of contract and sometimes by the law of unjustified enrichment. This is different from questions of concurrence in the sense that the same facts disclose two distinct causes of action that might be pleaded in the alternative by one party. On issues of concurrence in this sense see Stevens, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective – A Comment' in Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (1997), 225 at 228-30 and Visser, 'Concurrence of Enrichment and Contractual Claims' (2000) 117 *SALJ* 173.



careful consideration of the following: (a) the principles of recovery underpinning a particular remedy in each of the distinguishable contexts in which this remedy arises and (b) the consequences of imposing liability according to a particular set of doctrinal rules. It will be argued that the proper doctrinal basis of a particular remedy is the one which, having due regard to the consequences of imposing liability according to a doctrinal set of rules, most accurately reflects these principles of recovery.<sup>144</sup> The important difference between this approach and the abstract taxonomic approach is the type of reason used to support a particular doctrinal justification for classifying a remedy. My claim is that purely doctrinal reasons are, by themselves, not sufficiently cogent reasons for making doctrinal choices. This is not to say that those who advocate either the contractual or the enrichment view of restitution are wrong in respect of their ultimate conclusion. The claim is that if a particular conclusion turns out to be correct or partially correct, it is critical that this is for the right reasons.

In order to give content to the approach advocated here, it is first necessary to define precisely what is meant by 'principles'. In discussing judicial reasoning, Neil MacCormick gives the following useful explanation of what is meant by the 'principles' underlying legal rules:

[t]he 'general principles' ... express the underlying reasons for the specific rules which exist. As such they are not found but made; to give principle *p* as the 'underlying reason' of the rule *r*, or the rules *r*, *r*<sub>1</sub>, *r*<sub>2</sub>, *r*<sub>3</sub> and so on, is to impute to those who first introduced it some general policy whose introduction it was supposed to promote, or alternatively to state what seems the best contemporary justification for maintaining it. The content of the rules partly determines the possible range of reasons which could conceivably be adduced as explanatory of them. The contemporary standards of received values (what judges call 'common sense') further limit the matter; only what is conceived

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<sup>144</sup> This approach gives substance to the calls of those who have argued, albeit in different contexts, that justice or policy reasons, ought to guide the choice between classifying a remedy according to a particular set of doctrinal rules. See Van der Walt, (1985) 48 *THRHR* 23 and Wolffe, (1997) 1 *Edin LR* 477.

good or desirable can count as a policy whose furtherance by the introduction or maintenance of legal rules can be propounded as the underlying justification and rationalization of the rules in question. Statements of 'legal principles' are normative expressions of such rationalizing or justifying policies.<sup>145</sup>

It is in this sense that 'principles' will be used throughout this thesis.

In respect of the consequences of imposing liability according to a particular set of doctrinal rules, it will be demonstrated that two considerations are critical: first, unjustified enrichment law necessarily brings with it the change of position/loss of enrichment defence and secondly, once impoverishment of the pursuer is established, unjustified enrichment law has one hand tied behind its back in that it is restricted to viewing matters exclusively from the defender's perspective.

Having defined what these principles and consequences are, the next task is to give them meaningful content in the context of the claims under review. A helpful way of teasing out these principles and these consequences is by considering real and hypothetical cases. It will be demonstrated that our intuitions about the just results that ought to be reached in these real and hypothetical cases indicate that three general factors are critical in distilling the principles of recovery underpinning the remedies arising in the three species of contractual failure: the contract price; the contractual allocation of risk; and the incidence of fault in the circumstances leading to contractual failure. The last of these factors is also a key feature in distinguishing between contracts terminated as a consequence of breach and improperly obtained consent on the one hand and contracts terminated as a consequence of frustration on the other. This suggests that the features which distinguish the three species of contractual failure also have an important role to play in distilling the principles of recovery underpinning the

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<sup>145</sup> MacCormick, *Legal Reasoning and Legal Theory* (1978), 166. Dworkin's view of legal principles – as they are contrasted to legal rules – would have been equally helpful for my purpose. See Dworkin, *Taking Rights Seriously* (1978), 22-3 and 26.

claims under review.

Furthermore, examining the position in other jurisdictions can also assist with the task of uncovering the principles of recovery. This will involve examining the specific rules that regulate the consequences of contractual failure in other jurisdictions.

Although Hutton attempts to attribute a unitary purpose to restitution after termination for breach, a more differentiated approach is necessary. This is because the circumstances in which restitution occurs can differ significantly. Accordingly, it is necessary to test more carefully which principles underlie restitution in each of the justifiably divergent circumstances in which this claim arises. If different principles govern restitution in these different circumstances, then it is critical for the rules on restitution to reflect these principles. For this reason, restitution after termination for breach is divided into claims for restitution of money or returnable benefits in kind (chapter five) and claims for restitution of inherently non-returnable benefits (chapter six). Each of these chapters is further subdivided depending on whether the claimant is the contract breaker or the aggrieved party. This is necessary because it can affect the moral blameworthiness of the parties and this can influence the principles of recovery.

I will argue that the law of unjustified enrichment is in many cases insufficiently sensitive to the principles of recovery underpinning the claims under review. This is for two reasons. First, unjustified enrichment is tied to imposing liability according to a single principle, namely that no one should be unjustifiably enriched at another's expense. Secondly, where liability ought to rest on other principles, the unjustified enrichment doctrines that buttress the general principle are often too blunt or narrow to take these other principles into account. It will be argued that in the majority of cases contract law is, or can be adapted to be, more sensitive to these principles of recovery than the law of unjustified enrichment. This is because contract law is constituted by a

broader and more complex set of principles than the law of unjustified enrichment. Furthermore, even where liability does rest on the principle that no one should be unjustifiably enriched at another's expense, this can be accommodated by contract law. Accordingly, where a legal system has a choice between a contractual solution and an unjustified enrichment solution, contract law will often enable a more just solution than the law of unjustified enrichment.

## **Chapter 5**

### **Restitution of Returnable Benefits and Restitution of Money**

#### **5.1 Introduction**

The focus in this chapter is on restitution of returnable benefits and on restitution of money. The following chapter will focus on restitution of inherently non-returnable benefits. There are two reasons for this separate treatment: first, the different restitution claims raise different issues in respect of working out when the right to restitution arises and secondly, claims for restitution of inherently non-returnable benefits present more acute valuation problems.

As stated in the introduction to chapter four, the two critical questions that need to be answered are: (a) when does the right to restitution arise and (b) when this right arises, what is the quantum of this restitution claim? When the question about the doctrinal basis of restitution arises, the approach suggested in section 4.4.4(ii)(d) will be followed.

After the introduction, this chapter is divided into three main sections: the first considers restitution of returnable benefits; the second section considers restitution of money from a co-contractant and the third considers restitution of money from a third party (i.e someone other than a co-contractant).

#### **5.2 Restitution of Returnable Benefits**

##### **5.2.1 Aggrieved Party's Claim**

Both South African law and Scots law grant the aggrieved party the right to

claim restitution of returnable benefits conferred on the contract breaker prior to termination for breach.<sup>1</sup> This will occur most commonly when the aggrieved party sells and delivers goods to a purchaser who subsequently breaches the contract. Where the goods can be returned, it makes no difference whether the claim is regarded as a contractual remedy or as an enrichment remedy. Either way, the aggrieved party gets the actual goods back.<sup>2</sup>

Problems arise, however, if exact restitution is no longer possible, say, because the goods are accidentally lost or destroyed. The general rule in contracts of sale is that the purchaser bears the risk of accidental loss of, or destruction to, the goods. Accordingly, it is right that the breaching purchaser rather than the aggrieved seller bears this loss. From a doctrinal point of view, this is significant as this result would not be achieved if the breaching purchaser was allowed to repel the aggrieved party's restitution claim with the change of position defence. If the claim were to be regarded as enrichment-based, then it is imperative that the contract breaker is prevented from raising this defence. Although it is clear that this defence rests on an equitable foundation and would probably be denied to the contract breaker in these circumstances, this is by no means clear given the uncertain scope of the defence in South African and Scots law.<sup>3</sup> It is important to note, however, that the aggrieved party can sidestep this problem by repackaging his restitution claim as a claim for reliance loss

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<sup>1</sup> For South African law see *Bonne Fortune Beleggings Bpk v Kalabari Salt Works (Pty) Ltd* 1974 (1) SA 414 (NC) at 423-4; *Van Heerden v Sentrale Kunsmiskorporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 31 and *Baker v Probert* 1985 (3) SA 429 (A) at 438. For Scots law see *McCormick v Rittmeyer* (1869) 7 M 854 at 858 and *Lloyds Bank plc v Bamberger* 1993 SC 570 at 573. As we shall see the right to claim restitution is not as clearly established in Scots law as it ought to be.

<sup>2</sup> It is clear in these cases that the aggrieved party can escape the consequences of a bad bargain by claiming restitution. This is also the solution favoured by the *Principles of European Contract Law*. See PECL Art 9:308 and Lando and Beale (eds), *Principles of European Contract Law* (2000), comment on Art 9:308.

<sup>3</sup> For the scope of the defence in South African and Scots law see sections 4.2.3 and 4.3.3 respectively.

damages.<sup>4</sup>

If the contract breaker is prevented from raising this defence, how much can the aggrieved party recover by way of substitutionary financial restitution? The critical question is whether the aggrieved party is entitled to the value of the benefit conferred even where this will leave him better off financially than he would have been had the contract been fulfilled, or whether, on the contrary, his expectation interest should cap his restitution claim. The following example illuminates the issues at stake. Say that A sold his rare second hand sports car to B for £5,000. B was obliged to pay the purchase price in five monthly instalments. B pays the first instalment and A delivers the car. At the end of the first month the car is accidentally destroyed by fire and thereafter B repudiates the contract. A terminates the contract. It turns out that the car was worth £7,500. The question is whether A can claim £7,500 from B or whether his claim is limited to £5,000.

If the aggrieved party claims reliance loss damages, his claim will be restricted by his expectation interest (£5,000). In any event this issue is unlikely to arise in practice as it would always be in the contract breaker's interest to pay the remaining instalments if he knew that breaching the contract would open him up to a greater (enrichment) claim.

This is also probably the correct result in principle as it seems intuitively unfair to allow the aggrieved party to make a windfall gain in these circumstances.<sup>5</sup>

Accordingly, the aggrieved party's restitution claim ought to be measured with reference to the contract price. This indicates that the law of contract provides the solution to these cases. There is accordingly no good reason to change the existing

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<sup>4</sup> For the overlap between the restitution interest and the reliance interest in contractual damages see Hutchison, 'Back to Basics: Reliance Damages for Breach of Contract Revisited' (2004) 121 *SALJ* 51 at 57-8.

<sup>5</sup> For an argument as to why this might not be the case in a limited number of circumstances see section 6.4.2(iii)(b).

doctrinal basis of this claim in South African law. Although the doctrinal basis of restitution of returnable benefits is not clear in Scots law, it is submitted that Scots law ought to follow South African law in this regard.

### 5.2.2 Contract Breaker's Claim

A contract breaker's claim for restitution of returnable benefits will occur most commonly in a contract of sale where the aggrieved party is the purchaser and the contract breaker is the seller. The contract breaker's restitution claim will frequently be raised as a counter-claim to the aggrieved purchaser's claim for restitution of the purchase price.

#### (i) South African Law

In South African law, if the aggrieved party cannot make counter-restitution by exact equivalent or *in specie* then, subject to a number of exceptions outlined below, he loses his right to *terminate* the contract.<sup>6</sup> This inability may be caused by loss, destruction or alienation of the goods.

There are, however, a number of exceptions to the above rule. Termination is still permitted if the reason for the inability to return the performance is not attributable to the aggrieved party's fault.<sup>7</sup> In these circumstances the contract breaker's claim for

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<sup>6</sup> *Van Heerden v Sentrale Kunsmiskorporasie (Edms) Bpk* 1973 (1) SA 17 (A). For a full discussion of the South African law in this regard see Van der Merwe *et al.*, *Contract: General Principles* (2003), 374-6.

<sup>7</sup> Examples in this category include loss or destruction caused by the following: *vis major* (*Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (N)); fair wear and tear (*Beneke v Laney* 1949 (3) SA 967 (ODPA) at 972); the use in the ordinary way as contemplated by the parties (purpose and manner) without the aggrieved party receiving any benefit (*Montagu Cooperative Wineries Ltd v Lewin* 1912 CPD 1153); and an inherent defect or weakness in the subject matter complained of (*Marks Ltd v Laughton* 1920 AD 12). See more generally *Exxel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) at 731-3.



restitution is for the surrogate (where applicable) or the value of what remains in the aggrieved party's possession.<sup>8</sup>

Even where the impossibility of making full counter-restitution is due to the aggrieved party's fault, the courts have sometimes been willing to relax the strict requirement of counter-restitution and have ordered the deficiency to be made up by pecuniary substitute.<sup>9</sup>

Perhaps a better approach would be for South African law to permit the aggrieved party to terminate the contract in all cases and to allow the contract breaker to claim restitution by way of a financial substitute.<sup>10</sup> This will clear the way for a principled evaluation of the critical issue that arises on these facts: who should bear the risk of the accidental damage to, or destruction of, the subject matter of the sale where there is no connection between the damage/destruction and the breach?

The current South African law does not answer this question directly. Instead, according to the general risk rule in contracts of sale, the purchaser bears the risk of accidental loss to, or destruction of, the goods. The question is whether this rule is appropriate in this context.

## (ii) *Scots Law*

In Scots law, the question of the contract breaker's claim for restitution of returnable goods has arisen in the prescription context. In *N.V. Devos Gebroeder v*

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<sup>8</sup> In *Basson v Barkhuizen* 1945 CPD 37 the aggrieved party who slaughtered a pig remained liable for the value of the carcass. Similarly, in *Dibley v Furter* 1951 (4) SA 73 (C) the aggrieved party was liable to restore the price obtained from the sale of the *res vendita* to third party.

<sup>9</sup> *Harper v Webster* 1956 (2) SA 496 (FS). See also *Van Heerden v Sentrale Kunsmiskorporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 31-2 and *Cash Converters Southern Africa v Rosebud WP Franchise* 2002 (5) 494 (SCA) at 509.

<sup>10</sup> See also section 5.3.1(ii)(c) for further analysis of this argument.

*Sunderland Sportswear Ltd*<sup>11</sup> a seller delivered goods that turned out to be partly defective. As a result of these defects, the purchasers successfully repelled a claim for the contract price in respect of non-defective goods. After litigation had determined that the sellers could not claim on the contract, they instituted an enrichment claim (recompense) to recover for the goods that were accepted and profitably used by the purchasers.<sup>12</sup> Although the court accepted that the sellers could, in principle, have an enrichment action in these circumstances, it was unnecessary to decide the issue because it was held that this enrichment claim had prescribed.<sup>13</sup> The case is, however, of limited authority for present purposes since academic commentary has established that it was not necessary to resort to the law of enrichment on these facts. MacQueen has suggested that the real problem with the case was that it was incorrectly decided at first instance. When the case was decided, the law stated that a purchaser, faced with partly defective goods, either had to reject all the goods (and thus avoid liability for the total contract price) or accept all the goods and pay the purchase price subject to his claim for damages.<sup>14</sup>

In dealing with accidental damage to, or destruction of, returnable goods, Scots common law does not appear to prevent the aggrieved party from terminating the contract because of an inability to make counter-restitution of returnable benefits.<sup>15</sup> For

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<sup>11</sup> 1990 SC 291.

<sup>12</sup> *N.V. Devos Gebroeder v Sunderland Sportswear Ltd* 1990 SC 291 at 298-9.

<sup>13</sup> *N.V. Devos Gebroeder v Sunderland Sportswear Ltd* 1990 SC 291 at 304.

<sup>14</sup> MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (1997), 199 at 202. See now s35A of the Sale of Goods Act 1979 (as amended) which allows the purchaser to reject part of a consignment of goods without having to reject the whole consignment. It is thought that the purchaser remains liable at the contract rate for the goods that have been accepted. Beale *et al.* (eds), *Chitty on Contracts* (1999), para. 43-285. For another argument about resolving *N.V. Devos Gebroeder* along contractual lines see Evans-Jones, *Unjustified Enrichment* (2003), para. 10.49.

<sup>15</sup> None of the textbooks list this as one of the reasons that might cause the aggrieved party to lose his right to terminate the contract for the contract breaker's breach. See for example, MacQueen and Thomson, *Contract Law in Scotland* (2000), para. 5.43-52 and McBryde, *The Law of Contract in Scotland* (2001), para. 20-121. Indeed, MacQueen has stated that the aggrieved party's ability to make *restitutio in integrum*, a requirement for setting aside a voidable contract, does not apply to termination for breach. MacQueen,

a complete picture, it is necessary to consider the Sale of Goods Act 1979 (as amended). In respect of bearing the risk, the basic rule in the Sale of Goods Act is that risk of accidental damage to, or destruction of, the goods tracks the ownership of those goods. If the seller has reserved the ownership of the goods, the accidental destruction of the goods (and concomitant inability to return the goods) would probably not block the purchaser's right to terminate the contract. In cases where the purchaser carries the risk, academic opinion is that this would not block the purchaser's right to terminate the contract if the goods were destroyed as a result of the seller's breach.<sup>16</sup> The position is, however, unclear. The position is even less clear in cases where the cause of the accidental damage to, or destruction of, the goods is unconnected to the seller's breach. If risk tracks ownership and the purchaser takes ownership on delivery, then it would appear logical that the purchaser bears the risk and would, depending on the approach adopted, either lose his right to claim restitution of the price or be subject to a restitution claim from the contract breaker.

### (iii) *The Position in Principle and the Doctrinal Basis of Restitution*

In my view, the ability to make counter-restitution should not restrict the aggrieved party's right to terminate the contract and to claim restitution of the contract price. Such a restriction is a blunt way of dealing with the question of who should bear the risk of accidental loss of, or destruction to, the goods when compared with the

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'Unjustified Enrichment and Breach of Contract' (1994) JR 137 at 148. See also Hellwege, 'Unwinding Mutual Contracts: *Restitutio in Integrum* v. *The Defence of Change of Position*' in Johnston and Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 243 at 254.

<sup>16</sup> Guest *et al.*, *Benjamin's Sale of Goods* (2002), para. 12-057.

approach which allows counter-restitution by way of a monetary substitute.<sup>17</sup>

Where there is a connection between the breach of contract and the cause of the destruction of, or damage to, the goods, it is just to allow the aggrieved purchaser to claim restitution of the contract price without having to make counter-restitution to the contract breaker. Even South African law recognises this as an exceptional situation which does not prevent the aggrieved party from terminating the contract and claiming restitution of the purchase price.

The position is more complex when the goods are destroyed as a result of neither party's fault. The ordinary risk rules in contracts of sale state that the purchaser bears the risk of accidental destruction of the goods. If the aggrieved purchaser is entitled to claim restitution of the purchase price without simultaneously making counter-restitution, it will have the effect of reversing the contractual allocation of risk.<sup>18</sup> This has important implications for the doctrinal basis of the contract breaker's restitution claim. If the claim is enrichment-based, the aggrieved purchaser will be entitled to raise the change of position/loss of enrichment defence to repel the contract breaker's claim.<sup>19</sup> If the right answer is that the contractual risk rules ought to be respected, then South African law and Scots law would have to find a way of preventing the aggrieved purchaser from raising this defence and thereby escaping his duty to make counter-restitution. If the law is simply upholding a contractual risk rule, then surely it is better to leave it to the law of contract to regulate this restitution claim than to engage with the uncertainty surrounding the change of position defence.

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<sup>17</sup> This is the position adopted by both the Principles of European Contract Law (PECL Art 9:309) and Unidroit's Principles of International Commercial Contracts (PICC Art 7.3.6).

<sup>18</sup> When the contract breaker is the recipient of the goods, the aggrieved party's claim for reliance loss damages neutralises the loss of enrichment defence.

<sup>19</sup> For an alternative argument why the change of position defence should not be available after contractual failure see Hellwege, 'Unwinding Mutual Contracts: *Restitutio in Integrum* v. *The Defence of Change of Position*' in *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 243.

It is not easy to decide whether the contractual risk rules ought to be respected on these facts. On the one hand, a breach does entitle the aggrieved party to terminate the contract and this sets in motion the process of unwinding the contract. It can be argued that this sufficiently changes the relationship between the parties to warrant subverting the risk rules. The argument here is that it is justified to subvert the risk rules because the seller has not performed properly under the contract.<sup>20</sup> On the other hand, it could be argued that the merely fortuitous occurrence of a breach is not a sufficiently good reason to make the contract breaker responsible for the accidental damage to, or destruction of, the goods. This is supported by the fact that the breach is unconnected to the cause of the damage to, or destruction of, the goods. Furthermore, this approach is supported by the fact that if the purchaser knows that he carries the risk of accidental damage to, or destruction of, the goods, then he will make sure that he is insured against these risks.

This problem has been encountered in German law. §350 BGB (old version) provided the aggrieved party with a change of position defence in these circumstances. This provision had, however, been criticised on the grounds that it subverted the contractual risk rules.<sup>21</sup> Although the new rule in German law is that a party must make restitution in value if restitution in kind is no longer possible, this is subject to a number of exceptions.<sup>22</sup> Importantly, the duty to make good the value is excluded where the performance has deteriorated or has been destroyed despite the fact that the recipient has treated the performance in the way he would ordinarily treat his own goods. As a

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<sup>20</sup> Zimmermann, 'Remedies for Non-performance: The revised German law of obligations viewed against the background of the Principles of European Contract Law' (2002) 6 *Edin LR* 271 at 306-7.

<sup>21</sup> See Dannemann, 'Restitution for Termination of Contract in German Law' in Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (1997), 129 at 134-6; Zimmermann, 'Restitution After Termination for Breach of Contract in German Law' (1997) 7 *RLR* 13 at 20-1 and Krebs, *Restitution at the Crossroads: a comparative study* (2001), 96-8.

<sup>22</sup> §346 BGB (new version).

result, the risk still 'jumps back' to the seller.<sup>23</sup> Zimmermann has stated that the soundness of this rule will remain contentious in German law and it is clear that he thinks German law has missed an opportunity to change matters.<sup>24</sup>

On balance, it seems that the argument favours respecting the contractual risk rules. This means that the change of position defence is inappropriate in these cases. Accordingly, it seems right to leave it to the law of contract to regulate the contract breaker's restitution claim. This leads to the conclusion that the current law in South African ought to be retained. Although the doctrinal basis of this claim has not been clarified in Scots law, it is submitted that Scots law should, for the above reasons, follow South African law.

### **5.3 Restitution of Money from a Co-Contractant**

#### **5.3.1 Aggrieved Party's Claim**

It is settled in South African law that either party is, in principle, entitled to restitution of a monetary performance rendered prior to termination for breach. This is subject to that party's willingness and ability to make counter-restitution of any performance received. Although most commentators are of the opinion that this is (or, at least, ought to be) the position in Scots law, uncertainty in some of the case law precludes a definitive statement.<sup>25</sup>

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<sup>23</sup> Zimmermann, (2002) 6 *Edin LR* 306-7.

<sup>24</sup> *Ibid.*

<sup>25</sup> See for example, MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (1997), 199 at 216 where it is said that 'Scots law allows a party who has terminated a contract for the other's breach to claim restitution of any performance rendered before the termination.' Cf McBryde, *The Law of Contract in Scotland* (2001), para. 20-143 where he says that '[i]t is not clear that this is the present Scots law.'

The logical starting point is the case law dealing with the existence of the aggrieved party's right to claim restitution. I will argue that the aggrieved party ought, in principle, to have the right to reclaim a monetary performance rendered prior to termination for breach.

Two further issues require consideration: first, does the receipt of a counter-performance affect the aggrieved party's restitution claim and secondly, should the quantum of the aggrieved party's restitution claim be limited in order to prevent the escape from a bad bargain.

(i) *Availability of a Claim for Restitution of Money*

(a) South African Law

As stated above, it is trite law that the aggrieved party has the right to reclaim a monetary performance rendered prior to termination for breach. The courts have expressly stated that this right to restitution is a distinct contractual remedy.<sup>26</sup>

(b) Scots Law

As *Connelly v Simpson* is contentious and problematic in respect of recognising the aggrieved party's right to restitution of money, it will be helpful to consider the law apart from that case.

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<sup>26</sup> *Baker v Probert* 1985 (3) SA 429 (A) at 438-9. See also *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) at 807; *Meyer v Hessling* 1992 (3) SA 851 (Nm Sc) at 866 and *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at 201.



A number of Scottish commentators have stated that the aggrieved party can, as a matter of principle, claim restitution of a monetary performance rendered prior to termination for breach. For example, Bell states that an aggrieved purchaser's claim has two elements:

'[t]he claim of the buyer, to whom delivery is refused, is twofold: 1. For repayment of the price, if already paid to the seller; and, 2. For indemnification of the loss sustained by non-fulfillment.'<sup>27</sup>

In a section entitled 'Rescission of Contract Involves Restitution' Gloag similarly states that:

'[i]n cases of breach of contract the party aggrieved has an action for damages, but in addition to this, and whether damages have been suffered or not, he is clearly entitled to recover any part of the price or other consideration which he may have paid.'<sup>28</sup>

In respect of contracts of sale, these statements find support in a number of older Scottish cases. For example, Lord President Inglis stated in *McCormick v Rittmeyer* that

'[w]hen a purchaser receives delivery of goods as in fulfilment of a contract of sale, and thereafter finds that the goods are not conform to order, his only remedy is to reject the goods and rescind the contract. If he has paid the price, his claim is for repayment of the price, tendering re-delivery of the goods.'<sup>29</sup>

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<sup>27</sup> Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (1870), 478.

<sup>28</sup> Gloag, *The Law of Contract* (1929), 59-60. See also MacQueen, 'Unjustified Enrichment and Breach of Contract' (1994) JR 137 at 139-42. Cf McBryde, *The Law of Contract in Scotland* (2001), paras 20-108 to 20-120 and paras 20-132ff where it appears that he does not regard restitution as one of the natural consequences of terminating a contract for breach.

<sup>29</sup> (1869) 7 M 854 at 858. It is settled law that the aggrieved party has the right to claim contractual damages. Lord President Inglis was accordingly incorrect to limit the aggrieved party's claim to restitution of the price. See also *Duff & Co. v The Iron and Steel Fencing and Buildings Co.* (1891) 19 R 199 where the purchaser of defective iron huts was entitled, after termination, to reclaim the purchase price and *Aird &*



This position is supported by section 54 of the Sale of Goods Act 1979 (as amended) which states that the purchaser has the 'right... to recover money paid where the consideration for the payment of it has failed.'<sup>30</sup> This finds further support in the following dictum by Lord President Inglis in *Watson v Shankland*:

'... if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration.'<sup>31</sup>

Finally, *Lloyds Bank plc v Bamberger* (decided after *Connelly*) recently held that

'[u]nder our law, a seller who rescinds such a contract of sale, cannot retain advances or instalments of the price that he has received, but is required to repay these to the purchaser unless the payment falls to be regarded as a deposit.'<sup>32</sup>

In my view, these cases support the claim that Scots law allows the aggrieved party to claim restitution of money transferred prior to termination for breach. The waters have, however, been muddled by *Connelly v Simpson*.

Before discussing this case, it is necessary to mention one apparent exception to the aggrieved party's right to restitution of money. This is the rule in freight cases that a payment of freight, as opposed to an advance against payment of freight, is not recoverable if the voyage is not completed. This distinction was criticised in section

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*Coghill v Pullan & Adamas* (1904) 7 F 258. For contracts involving the sale of heritage see *Croft v Stewart's Trs* 1927 SC (HL) 65 and *Mason v A & R Roberston & Black* 1993 SLT 773 (OH) at 780.

<sup>30</sup> The buyer has the right to claim the return of the purchase price if the seller is in material breach of contract. This would commonly occur, for example, if the seller has breached any of the implied terms in the Sale of Goods Act 1979 (as amended).

<sup>31</sup> (1871) 10M 142 at 152.

<sup>32</sup> 1993 SC 570 at 573.

3.3.3(i). It was suggested there that this rule is better rationalised on the basis of the accrued rights doctrine and the right to claim restitution. Although some facts might justify the conclusion that right to restitution has been excluded by the contract, this is not strictly speaking an exception to the aggrieved party's right to claim restitution. Instead, the analysis demonstrated that this is merely an ordinary application of the doctrines and principles regulating termination for breach.

(b ii) *Connelly v Simpson*

The facts were as follows. C paid £16,000 for one-third of the shares in S's company. C negotiated for the right to demand delivery of the shares at some time in the future in order to minimise the value of his estate for his divorce proceedings. As a result of performing badly in the two years following the sale, S put the company into voluntary liquidation. The liquidator offered C £400 - a third of the remaining company assets. C alleged that S had breached the contract and instituted a restitution claim for £16,000.<sup>33</sup> For present purposes, the worrying part of the case is that the majority held that the aggrieved party is not entitled to restitution of money transferred prior to termination but is limited, instead, to a claim for contractual damages. This emerges from the following dictum by Lord McCluskey:

‘... I can find nothing which is explicit authority for the view that a person who has paid in advance of performance the sum of money which will be due in respect of performance but has agreed that there should be no performance until after a significant period of time, can claim anything other than damages when, the time for performance having arrived, the other party, in breach of contract, declines to perform or is unable to do so because, by his own actions, he has put it beyond his power to perform his part of the contract. Leaving aside the other remedies which might arise following a breach of contract, the

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<sup>33</sup> *Connelly v Simpson* 1993 SC 391 at 393-4.

only remedy available to a person for breach of contract, if he seeks a monetary remedy, is to claim damages which will compensate him for his loss... I see no room, in a breach of contract case ... for a remedy in the form of restitution of the price as such.<sup>34</sup>

The case has been roundly criticised for denying, in principle, that the aggrieved party has the right to restitution of money.<sup>35</sup> The most trenchant and cogent criticism is by the Scottish Law Commission. First, they state that this will lead to incoherence in the law. *Lloyds Bank plc v Bamberger* has decided that an aggrieved seller must repay instalments of the price received prior to termination for breach. If an aggrieved purchaser is prevented from claiming restitution from a seller in breach, then an aggrieved seller would incoherently be in a worse position than a seller in breach.<sup>36</sup>

Secondly, they correctly point out that denying the aggrieved party the right to restitution of money leads to arbitrary results. This is because an aggrieved purchaser who has not paid under the contract would indefensibly be in a stronger position than a purchaser who happens to have made payment in the same circumstances.<sup>37</sup>

Furthermore, the rule in *Connelly* puts the aggrieved party seeking restitution in a breach case in a worse position than a party seeking restitution in cases where the contract is terminated for improperly obtained consent or by frustration.<sup>38</sup> This is problematic as the a recipient of money in breach is morally more culpable than the equivalent party in the other two cases.

This clearly demonstrates that the rule articulated by Lord McCluskey in *Connelly* ought to be jettisoned from Scots law. Instead, Scots law should follow the approach

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<sup>34</sup> 1993 SC 391 at 407-8.

<sup>35</sup> Hogg, *Obligations* (2003), para. 4.93; MacQueen, (1994) JR 143; Dieckmann and Evans Jones, 'The Dark Side of *Connelly v Simpson*' 1995 JR 90 at 99; and Scottish Law Commission, *Remedies for Breach of Contract* (Discussion Paper No. 109, 1999), paras 4.40-3.

<sup>36</sup> Scottish Law Commission, *Remedies for Breach of Contract* (Discussion Paper No. 99, 1999), para. 4.41.

<sup>37</sup> Scottish Law Commission, *Remedies for Breach of Contract* (Discussion Paper No. 99, 1999), para. 4.42.

<sup>38</sup> Evans-Jones, *Unjustified Enrichment* (2003), paras 6.117-8.

supported by the cases discussed in subsection (i) above. Indeed, Lord Brand, giving the dissenting judgment in *Connelly*, stated that

‘... it seems to me to be no more than common sense that a vendor who has been fully paid but is unable to fulfil his obligation under the contract should be liable to make restitution of the price.’<sup>39</sup>

(c) The Position in Principle

It is clear from the preceding discussion that the aggrieved party ought, in principle, to have the right to claim restitution of money transferred prior to termination for breach. In South African law, it is settled that this is the position. Although there is ample authority to support the position in principle in Scots law, *Connelly v Simpson* has unfortunately left the law unclear. My view, in line with the unanimous call from the Scottish commentators, is that *Connelly* ought to be overturned on this point. This will clear the way for Scots law to recognise unequivocally that the aggrieved party has the right, in principle, to restitution of money.

(ii) *Limitation on the Right to Restitution: Receipt of a Counter-performance*

(a) South African Law

If the aggrieved party cannot make counter-restitution by exact equivalent or *in specie* then, subject to a number of exceptions, he loses his right to *terminate* the contract.<sup>40</sup> The aggrieved party’s inability to make counter-restitution may be for one of

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<sup>39</sup> *Connelly v Simpson* 1993 SC 391 at 415.

<sup>40</sup> *Van Heerden v Sentrale Kunsmiskorporasie (Edms) Bpk* 1973 (1) SA 17 (A).

two reasons. First, because a returnable benefit has, since its receipt, become incapable of being returned. This was considered in section 5.2.1. Secondly, because the benefit received is, by its very nature, incapable of being returned. Examples of benefits in this category are the use of the contract breaker's property or the receipt of the contract breaker's services.<sup>41</sup> This is the focus of this section.

It is settled that South African law grants the contract breaker an independent claim in unjustified enrichment against the aggrieved party for the value of intrinsically non-returnable benefits conferred under a contract subsequently terminated for breach. The question that arises here is what, if any, is the relationship between this claim and the aggrieved party's right to claim restitution of money.

Given the undisputed recognition of the contract breaker's right to claim restitution, one would expect that South African law would recognise a correlation between this claim and the aggrieved party's restitution claim. Accordingly, when the aggrieved party claims restitution of his money performance, he ought to be under a corresponding obligation to make counter-restitution to the contract breaker. Sally Hutton has pointed out that the South African courts and academic writers have not always fully appreciated this correlation. She identifies three distinct views in this regard.<sup>42</sup>

At one extreme is the view that the impossibility of returning the performance prevents the aggrieved party from terminating the contact.<sup>43</sup>

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<sup>41</sup> If restitution is partly impossible owing to the aggrieved party's fault, then he will be allowed to terminate the contract and claim restitution provided he can still substantially return what he has received coupled with payment for the shortfall. See *Harper v Webster* 1956 (2) SA 495 (FC); Lubbe and Murray, *Farlam and Hathaway-Contract: Cases Materials and Commentary* (1988), 592; and Van der Merwe *et al.*, *Contract: General Principles* (2003), 375.

<sup>42</sup> Hutton, *Restitution After Breach of Contract: A Comparative Study of English and South African Law* (unpublished Masters Thesis, University of Oxford, 1994), 32-8.

<sup>43</sup> *O'Connell v Flischman* 1948 (4) SA 191 (TPD) and *Uni-Erections v Continental Engineering Co. Ltd* 1981 (1) SA 240 (W). This view is irreconcilable with the current law. See *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) at 731-3.

At the other extreme is the view that the aggrieved party has no duty of counter-restitution in respect of non-returnable benefits. According to this view, the duty to restore performances received prior to termination for breach (and so the corresponding duty of counter-restitution) is restricted to the recovery of returnable benefits, whether in kind or in money. Although this view recognises that either party may have an independent enrichment action for the value of non-returnable benefits, it regards this as a different remedy with no correlative duty of counter-restitution. In other words, compensation of the contract breaker is not considered to be a precondition for the aggrieved party's right to claim restitution of his monetary performance.<sup>44</sup> As principal evidence of this approach Hutton cites the following composite statement by Wouter De Vos:

'[o]n cancellation, the original obligations disappear and are replaced by reciprocal duties to restore where restoration is possible and practicable by reason of the nature of the performance ... A party for whom work has been done under the contract may cancel the contract without making restitution if restitution would, for example, bring about the demolition of his house in order to return the building materials... Labour is in any event not restorable... [The aggrieved party] is then liable in enrichment for the amount by which he remains enriched after he has restored what he can and must restore after termination, as is the case where he has received a performance which cannot by its nature be returned, which is the position, inter alia, where his land is built upon.'<sup>45</sup>  
(Hutton's translation)

This view, Hutton argues, explains those cases where the receipt of a non-returnable benefit by the aggrieved party is completely overlooked by the court when assessing the aggrieved party's claim for restitution of money. This occurred in *De Vries v Wholesale*

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<sup>44</sup> Hutton, *Restitution After Breach of Contract: A Comparative Study of English and South African Law* (unpublished Masters Thesis, University of Oxford, 1994), 34.

<sup>45</sup> Hutton, *Restitution After Breach of Contract: A Comparative Study of English and South African Law* (unpublished Masters Thesis, University of Oxford, 1994), 34 quoting De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987), 158, 279 and 287.

*Cars*<sup>46</sup> where the court ignored the fact that, prior to termination, the aggrieved purchaser had the use of the car for ten days and drove 1000 kilometers.

According to the final view, there is a direct link between the aggrieved party's restitution claim and the contract breaker's restitution claim. *Hall-Thermotank Natal (Pty) Ltd v Hardman*<sup>47</sup> is the cornerstone of this approach. In this case, the contract provided for the installation of a refrigeration plant on the employer's fishing vessel. When the contractors claimed payment for the work done, the employer counter-claimed for termination of the contract, the return of payments already made and for damages. The contractors argued that the employers were prevented from terminating the contract as a result of being unable to restore the labour and certain materials supplied under the contract. In rejecting this argument the court held that an aggrieved party is obliged to compensate the contract breaker for work done under the contract to the extent that he has benefited therefrom and that such compensation is a precondition to his right to terminate the contract. This is evident from the following statement:

'to preserve that right [to terminate the contract] the owner must tender to restore the benefits he has received pursuant to the contract ... he is not obliged to make compensation for work or services rendered from which he derived no benefit; the obligation of the owner to make restoration is not necessarily a *sine qua non* to his right of rescission [termination], so that his inability to make restitution is excused if it is not due to his own fault, for example, where the fruits of the labour have perished *casu fortuito*, or where restitution of work and labour which were of no benefit to him is not possible.'<sup>48</sup>

In light of recent case law, it is now established that this third view represents

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<sup>46</sup> 1986 (2) SA 22 (O).

<sup>47</sup> 1968 (4) SA 818 (D).

<sup>48</sup> 1968 (4) SA 818 (D) at 833. For the same approach see *Ambrose & Aitken v Johnson & Fletcher* 1917 AD 327 where it was held that there was no duty on the defendant to make counter-restitution in respect of labour from which he had not benefited. This case was approved in *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (N) at 829. See also *Sacher v African Canvas & Jute Industries (Pty) Ltd* 1952 (3) SA 31 (T).



the current approach to the receipt of a counter-performance in South African law. An example is *Masters v Thain t/a Inhaca Safaris*.<sup>49</sup> In this case, a holiday maker contracted to go on holiday on the express undertaking that there would be scuba diving facilities available. On arrival at the destination, it transpired that there were no such scuba diving facilities. The aggrieved party immediately terminated the contract and requested to be flown home. The first available flight home was four days after the date of arrival.<sup>50</sup> The court upheld the aggrieved party's claim for restitution of the purchase price. In so doing, the court asked whether the contract breaker was entitled to any compensation as a result of the aggrieved party having made use of some of the facilities during the four days he was at the destination. If such compensation was appropriate, the court stated that the aggrieved party's restitution claim should be correspondingly reduced. Although the court found on the facts that the aggrieved party had not received any bargained for benefits, the important point is that the court recognised the clear link between the aggrieved party's right to restitution and his corresponding obligation to make counter-restoration of non-returnable benefits.<sup>51</sup>

This case also indicates that the court's earlier reluctance to award substituted pecuniary restitution appears to be overcome.

This approach is further supported by the cases which have held that the value of the aggrieved party's use of the contract breaker's property must be set off against the latter's use of the former's money. This has occurred most commonly in cases where the aggrieved purchaser of a car has been evicted from possession by the true owner and has sought to reclaim the purchase price from the seller. A recent example is *Katzeff v*

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<sup>49</sup> 2000 (1) SA 467 (W).

<sup>50</sup> For the facts see *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W) at 468-9.

<sup>51</sup> *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W) at 474-5. For an identical approach see *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W).



*City Car Sales*.<sup>52</sup> In this case a purchaser bought a car for R29,150. Two and a half years later he was evicted from possession by the true owner. The purchaser claimed restitution of the purchase price from the seller. At the time of eviction the car had depreciated significantly and was worth R12,000. The sellers argued that the purchasers were only entitled to the value of the car at the time of eviction. They based this argument on the following *obiter dictum* by Botha JA in *Alpha Trust v Van der Watt*:

‘[i]t is possible that the purchaser of a rapidly deteriorating or consumable asset would not, after a long period of undisturbed possession and use thereof, always be entitled on eviction to repayment of the full purchase price as it is possible that it could be argued that a court could in such a case modify the amount of the purchase price which the seller should repay to the purchaser.’<sup>53</sup>

The court in *Katzeff* rejected, rightly in my view, the seller’s argument on the grounds that that it would be inequitable to allow a seller who had deceived a purchaser by selling a thing which he does not own to take advantage of his own wrongful conduct by retaining a portion of the purchase price.<sup>54</sup>

The court did, however, hold that the loss of interest and the use of the car balanced each other out and that a ‘meticulous readjustment’ of the economic imbalance between the parties was not necessary.<sup>55</sup>

This line of cases is important for two reasons: it confirms the link between the aggrieved party’s restitution claim and his obligation to make counter-restitution and it

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<sup>52</sup> 1998 (2) SA 644 (C).

<sup>53</sup> 1975 (3) SA 731 (A) at 749 (translation). See also *Cash Converters Southern Africa (Pty Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (5) SA 494 (SCA) at 508-9 where Lewis AJA held (*obiter*) that a claim for restitution of money is subject to an equitable adjustment downwards if the subject matter of the counter-restitution claim has deteriorated in value by the time of restitution.

<sup>54</sup> *Katzeff v City Car Sales* 1998 (2) SA 644 (C) at 653.

<sup>55</sup> *Katzeff v City Car Sales* 1998 (2) SA 644 (C) at 654. There are no cases where the courts have exercised their discretion to reduce the aggrieved party’s *prima facie* entitlement to reclaim the full amount paid under the contract.

indicates that South African law has moved away from a strict insistence on exact restitution as a prerequisite for contractual termination.

(b) Scots Law

The law relating to the receipt of a counter-performance in Scotland remains relatively unexplored. Indeed, the authorities are few and far between.

The starting point is the following dictum from *McCormick v Rittmeyer*: '[i]f he [the aggrieved party] has paid the price, his claim is for repayment of the price tendering redelivery of the goods.'<sup>56</sup> This position is reinforced by the Sale of Goods Act 1979 (as amended). In terms of the Act, the aggrieved buyer can terminate the contract for the seller's material breach and claim restitution of the purchase price.<sup>57</sup> As the contract in *McCormick* was for the sale of movable goods, the dictum only applies to returnable performances. The same limitation applies to the Sale of Goods Act 1979.<sup>58</sup> This leaves the problem of counter-restitution of inherently non-returnable performances.<sup>59</sup>

Like South African law, Scots law also grants the contract breaker a claim against the aggrieved party for restitution of inherently non-returnable performances rendered prior to termination for breach.<sup>60</sup> In respect of the relationship between the aggrieved party's right to restitution of money and the contract breaker's right to

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<sup>56</sup> (1869) 7 M 854 at 858. See also Gloag, *The Law of Contract* (1929), 59-60.

<sup>57</sup> As a result of recent amendments, there are now two avenues open to the buyer to terminate a contract of sale for breach. See respectively sections 15B(1)(b) and 48C(1)(b). For a discussion of the relationship between these two different rights of termination see Hogg, 'The Consumer's Right to Rescind under the Sale of Goods Act: a Tale of Two Remedies' 2003 *SLT (News)* 277. According to section 54, the buyer can claim restitution of the purchase price in both instances of termination.

<sup>58</sup> For reasons relating to conveyancing practice in Scotland, it is highly unlikely for a case to arise in which the purchaser of property pays the price prior to the seller's performance. It is thought that the law would be the same as for the sale of moveable goods. See MacQueen, (1994) *JR* 140.

<sup>59</sup> For the law relating to the receipt of returnable benefits that are no longer capable of return see section 5.2.2(ii).

<sup>60</sup> This issue is considered in detail in chapter 6.

restitution of inherently non-returnable benefits, the leading case is *Watson v Shankland* where Lord President Inglis stated that:

‘[i]f a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part, or any available part, of his contract. No doubt, if he perform a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been.’<sup>61</sup>

This dictum supports the proposition that there is a corresponding relationship between the two restitution claims. This aligns Scots law with the present position in South African law.

One of the problems originally encountered in South African law was how to deal with the aggrieved party’s use of the contract breaker’s property. Until recently, the position in Scots law was unclear. As a result of recent regulations amending the Sale of Goods Act 1979, the buyer’s right to reclaim the purchase price after termination can now be reduced in order to take into account any use that has been made of the goods.<sup>62</sup> The precise basis of this reduction is, unfortunately, not made clear. There is, however, much to be said for the flexibility of this open ended provision.

### (c) The Position in Principle

The position in principle requires the recognition of two points. First, the

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<sup>61</sup> (1871) 10 M 142 at 152.

<sup>62</sup> This only applies to the termination of a contract under the new Pt 5A of the Sale of Goods Act 1979 (as amended). See section 48C. This section was added by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045). For a discussion of these new provisions see Hogg, 2003 *SLT (News)*, 277.

inability to make exact counter-restitution should not prevent the aggrieved party from terminating the contract and claiming restitution of money. The courts should always award restitution by financial substitute. Secondly, the courts should recognise a correlation between the aggrieved party's claim for restitution of money and the contract breaker's claim for restitution of non-returnable benefits.

By adopting the position in principle (particularly in respect of the first point), Scots law and South African law will avoid the problems encountered in English law in this area. English law restricts the aggrieved party's right to claim restitution of money if he has received a counter-performance from the contract breaker. This manifests itself in the requirement that the failure of consideration (the trigger for a restitution claim) must be 'total'. Originally it was thought that total failure of consideration was excluded where the aggrieved party 'got or received any part of what he bargained for'.<sup>63</sup> It has, however, subsequently been held that failure of consideration will not be 'total' where the contract breaker has rendered performance irrespective of whether the aggrieved party benefited therefrom.<sup>64</sup>

The commentators in English law are unanimous in their call for this requirement to be abandoned. They argue that restitution ought to be allowed for partial failure of consideration. In order to assess this argument, it is necessary to evaluate the rationale underlying the total failure of consideration requirement. There are two main justifications. First, it prevents the unwarranted subversion of the a contract by the law of unjustified enrichment and secondly, it is merely another way of expressing the requirement that the aggrieved party must make counter-restitution to the contract breaker. When the aggrieved party cannot make exact counter-restitution, the total

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<sup>63</sup> Burrows, *The Law of Restitution* (2002), 329.

<sup>64</sup> Burrows, *The Law of Restitution* (2002), 329 and Treitel, *The Law of Contract* (1999), 977 n47.

failure of consideration requirement shields the courts from the potentially troublesome task of valuing the contract breaker's performance. Neither justification stands up to scrutiny.

Firstly, the right to claim restitution on the basis of failure of consideration is only triggered once the contract has been terminated for breach. Although the question about the precise relationship between contractual remedies and unjustified enrichment remedies after termination for breach is contentious, the important point for the present is that the contract is not undermined by allowing restitution where there has been a partial failure of consideration.

Secondly, there is academic support for the view that the failure of consideration will not be total if the benefit received is readily returnable.<sup>65</sup> The total failure requirement accordingly bites where the performance cannot be returned to the contract breaker.<sup>66</sup> As stated above, there is no convincing reason why the courts should not award restitution by way of financial substitute.

This establishes that the justifications for total failure of consideration are weak. Furthermore, there are three good reasons that have been raised against this requirement: the moral case for allowing the claim is the same irrespective of whether the failure of consideration is partial or total; the courts have not been consistent in their approach as to what constitutes total failure of consideration; and it is unjustifiably inconsistent with other areas of the law where restitution is allowed for partial failure of consideration.

The conclusion is that English law ought to jettison this requirement as the

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<sup>65</sup> Birks, *An Introduction to the Law of Restitution* (1989), 415 and Birks, 'No Consideration: Restitution after Void Contracts' (1993) 23 *UWALR* 195 at 211.

<sup>66</sup> See for example *Baltic Shipping Co. v Dillon (The Mikhail Lermontov)* (1993) 47 A.L.J.R. 228 (High Court of Australia).

trigger for a restitution claim. It is clear that Scots law and South African law ought to avoid these problems. This will be achieved by adopting the position in principle. In particular, South African law ought to jettison the requirement that exact counter-restitution must be possible in order to terminate a contract for material breach. Furthermore, both legal systems ought to allow counter-restitution to be made by financial substitute.

(iii) *Quantum of the Aggrieved Party's Restitution Claim: Can the aggrieved party escape the consequences of a bad bargain with a restitution claim?*

The focus in this section is on the quantum of the aggrieved party's restitution claim. The critical question is whether this claim ought to be limited by the aggrieved party's expectation interest. Put another way, is it open to the contract breaker to argue that his liability for restitution is limited to the contract price less the net loss that the aggrieved party would have made had the contract run its proper course? The following example illustrates the problem. A buys a second hand DVD player from B for R1000. A pays the purchase price and awaits delivery. On receiving delivery, A discovers that the DVD player is seriously defective. He terminates the contract. A tenders the return of the DVD player and claims restitution of the R1000. B establishes that the market value of a properly functioning DVD player in the same condition was R400 at the date of delivery. The question is whether A is entitled to reclaim the full R1000 or whether his claim is limited to R400 (R1000 less the net loss R600 that he would have made on the contract if there was no breach).

(a) South African Law

There is no direct authority in South African law indicating whether the aggrieved party can use restitution to escape the consequences of a bad bargain. At least one commentator has stated that

‘[o]f course, restitution, sometimes has the effect that the aggrieved party escapes the consequences of a bad bargain and is placed in a better financial position than due performance would have given him.’<sup>67</sup>

South African law has grappled with this issue when dealing with the relationship between negative and positive *interesse* damages. It was established in section 2.2.2(iv)(b) that Nienaber J in *Probert v Baker* was incorrect when he held that the aggrieved party’s restitution claim could be classified as a claim for negative *interesse* damages. On appeal Botha JA held that restitution of the contract price was a distinct contractual remedy rather than a claim for damages.

Importantly, it has subsequently been held that the claim for restitution of the contract price can either be seen as an independent remedy or as part of the aggrieved party’s claim for positive *interesse* damages. This is evident from the following dictum in *Masters v Thain t/a Inbaca Safaris*:

‘[w]here an injured party to a contract cancels that contract by reason of a breach thereof by the opposite party (the guilty party), his claim that the guilty party should repay or redeliver to the injured party the latter’s prestation under the contract does not, as a rule, fall within the purview of claims for payment of negative *interesse*. ... [t]he plaintiff’s claim fits the mould of that described by Nienaber J and Botha JA [in *Probert v Baker* and *Baker v Probert* respectively] as the distinct claim for repayment of the price and also into the mould of a claim

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<sup>67</sup> Sharrock, ‘Breach of Contract: Damages for Negative Interesse’ (1985) *TSAR* 207 at 211. See also *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) where the court granted the return of the purchase price in a case of supervening impossibility of performance irrespective of whether this involved an escape from a bad bargain.



for payment of his positive *interesse*. The plaintiff's claim is of the former kind for the following reason: not having received that for which he had bargained and having therefore lawfully cancelled the contract, he was, *prima facie*, entitled to repayment of the sum which he had paid the defendant... It is the latter type of claim because, had the defendant delivered as she was obliged to do, on his return to South Africa he would have brought home with him the experience and enjoyment of a holiday. As he did not bring that home with him, he was entitled to the monetary value thereof.<sup>68</sup>

Although nothing turned on how the claim was viewed in this case, there is an important difference between the two conceptualisations. If restitution is seen as part of the aggrieved party's positive *interesse* damages, then it is always open to the contract breaker to establish that the contract was a losing one. This will reduce the aggrieved party's claim by the net loss that he would have suffered had the contract run its course.<sup>69</sup> In terms of this approach, the aggrieved party will not be able to escape the consequences of a bad bargain with a restitution claim. This is only problematic if it is undesirable for the aggrieved party's claim to be limited in this way. This is considered in the subsection (c) below.

#### (b) Scots Law

There is no Scottish case dealing with the question under review. If the restitution claim in *Connelly v Simpson* had been successful, the aggrieved party would have escaped the consequences of a bad bargain. MacQueen has suggested that this may explain the court's reluctance to grant the claim. As the case decided that the aggrieved

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<sup>68</sup> *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W) at 473-4. See also *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) at 807 where the court held in a similar type of case that the claim for the return of the purchase price was a distinct contractual remedy.

<sup>69</sup> For a helpful description of the interests protected by contractual damages and the relationship between these interests see Hutchison, 'Back to Basics: Reliance Damages for Breach of Contract Revisited' (2004) *SALJ* 55-60. See also Fuller and Purdue, 'The Reliance Interest in Contract Damages' (1936) 36 *Yale LJ* 52 and 373 at 53-6. For a comparative account of the relationship between the interests see Treitel, *Remedies for Breach of Contract* (1988), 88ff.



party is restricted to a damages claim, it does not shed light on the issue under consideration.

There is, however, the Sale of Goods Act 1979 (as amended). Section 54 states that the buyer is entitled to reject goods for material breach and claim restitution of the purchase price.<sup>70</sup> Accordingly, the aggrieved party can escape a bad bargain with a restitution claim in sale cases.

### (c) The Position in Principle

If the aggrieved party is entitled to claim restitution of the full contract price in these circumstances, this will allow the escape from a bad bargain and a subversion of the contractual allocation of risk. Although this is not stated unequivocally, it appears that this is the position in South African and Scots law in contracts of sale. Is this justified or should the aggrieved party's restitution claim be limited by his expectation interest? The problem will not arise often in practice as an advantageous contract will usually deter a breach. In general the commentators have favoured the view that the aggrieved party should be able to escape the consequences of bad bargain with a restitution claim.<sup>71</sup> A number of arguments have been put forward supporting this view. The commentators in English law have argued that as restitution is an enrichment claim, it is independent of an action for breach of contract and hence does not need to 'bow down to the law of contract'.<sup>72</sup> In my view this is not a persuasive argument. The law of

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<sup>70</sup> Section 54 of the Sale of Goods Act 1979 (as amended). This is also the position when termination takes place in terms of the new remedies introduced by the Sale and Supply of Goods to Consumers Regulations 2002. See Part 5A of the Sale of Goods Act 1979 (as amended).

<sup>71</sup> American law and English law allow the escape from a bad bargain. See Burrows, *The Law of Restitution* (2002), 341-2 and Skelton, *Restitution and Contract* (1998), 33-9.

<sup>72</sup> Burrows, *The Law of Restitution* (2002), 342. For a similar argument see also Hutton, *Restitution After Breach of Contract: A Comparative Study of English and South African Law* (unpublished Masters Thesis, University of Oxford, 1994), 56-7.

unjustified enrichment does not have a mechanism for limiting the aggrieved party's claim for restitution of money. This is because there is no test of enrichment which can prevent the aggrieved party from arguing that the contract breaker was enriched to the extent of the money received. Accordingly, those who argue that restitution ought to be classified as an enrichment action must maintain that the aggrieved party is entitled to escape from a bad bargain by being allowed to claim restitution of the full contract price.

It was stated in chapter four that the proper doctrinal basis of restitution ought to be decided by considering the principles of recovery underpinning a particular remedy and the consequences of imposing liability according to a particular set of doctrinal rules. According to this approach it is necessary to test whether the existing position is justified by good policy or justice. This, rather than an abstract taxonomic justification, is the appropriate basis to determine the doctrinal foundation of restitution.

The law has a clear choice between two alternatives in these cases: to allow some aggrieved parties to escape losing contracts after termination for breach or to allow some contract breakers to retain all, or some portion, of the contract price without having to provide reciprocal counter-performance.

Some commentators have argued that the policy of the law should favour the aggrieved party, even if this means that some aggrieved parties escape from losing contracts.<sup>73</sup> This view is defended on two grounds. First, it is claimed that allowing restitution of the full contract price actually protects the sanctity (or binding nature) of a contract. The point is that if the contract breaker is aware that he will not be able to retain any part of the contract price, then this will provide an incentive for

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<sup>73</sup> See MacQueen, (1994) JR 148 and Hogg, *Obligations* (2003), para. 4.97.

performance.<sup>74</sup>

Secondly, it is claimed that the contracting party should not be able to benefit from his contractual expectations unless he is ready and willing to perform his side of the bargain. The argument here is that the aggrieved party's restitution claim should not be restricted because the contract breaker forfeits his rights under the contract after termination for his breach.<sup>75</sup> This argument has been countered on the grounds that a breach does not necessarily involve moral culpability on the part of the contract breaker. This might occur, for example, in a complex construction contract where a protracted dispute might result in both parties genuinely believing that the other party is in breach. Accordingly, when the final decision is made as to which party is in breach, it might be difficult to attach moral condemnation to the party in breach.<sup>76</sup> It should not be overlooked, however, that in many cases it is easy to ascribe moral responsibility to the contract breaker.

Although the case is not watertight, on balance, the arguments favour allowing the aggrieved party to claim restitution of the full contract price and thereby escape the consequences of a losing contract. Scots law and South African law should, accordingly, adopt this position unequivocally.

From a doctrinal point of view, it makes no difference whether the aggrieved party's restitution claim is classified as a contractual or as an enrichment remedy. Either way, the aggrieved party can claim restitution of the full contract price. There is accordingly no good reason to change the existing South African law which states that the claim for restitution of money is a distinct contractual remedy.

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<sup>74</sup> Beatson, 'Gap-Filling and Risk-Reversal' in Beatson (ed), *The Use and Abuse of Unjust Enrichment* (1991), 78 at 89.

<sup>75</sup> See Hutton, *Restitution After Breach of Contract: A Comparative Study of English and South African Law* (unpublished Masters Thesis, University of Oxford, 1994), 57 and Skelton, *Restitution and Contract* (1998), 41.

<sup>76</sup> Skelton, *Restitution and Contract* (1998), 65-6.

### 5.3.2 Contract Breaker's Claim

#### (i) *South African law*

In South African law, the contract breaker has a claim for restitution of a contractual payment. In the event of breach, it will usually be the aggrieved party who institutes a claim for restitution of his contractual performance. As a result, the contract breaker's restitution claim will usually fall under the aggrieved party's duty to make counter-restitution.

#### (ii) *Scots Law*

The leading Scottish case on the contract breaker's right to restitution of money is *Zembunt (Holdings) Ltd v Control Securities plc*.<sup>77</sup> The facts were as follows. Zembunt (Holdings) Ltd had successfully bid at an auction to purchase heritable property from Control Securities plc. The purchaser agreed to pay a £165,000 deposit and the remainder of the purchase price on a specified date. The purchasers failed to fulfil this obligation and the seller justifiably terminated the contract. The purchaser sought to recover the £165,000 with the *condictio causa data causa non secuta*.<sup>78</sup> Lord Marnoch characterised the purchaser's payment as an advance part payment of the purchase price. He dismissed the claim because, in his view, the *condictio causa data causa non secuta* is an equitable remedy that is not available to the contract breaker.<sup>79</sup>

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<sup>77</sup> 1992 SC 58.

<sup>78</sup> *Zembunt (Holdings) Ltd v Control Securities plc* 1992 SC 58 at 61-2.

<sup>79</sup> *Zembunt (Holdings) Ltd v Control Securities plc* 1992 SC 58 at 63.

On appeal, the Inner House characterised the payment as a forfeitable deposit which served as a pledge that performance would be forthcoming. It could, accordingly, not be reclaimed once the sellers had terminated the contract for the purchaser's breach.<sup>80</sup>

Hogg has suggested that this case 'can be accommodated within the traditionally understood view that a reciprocated advance performance may not be reclaimed.'<sup>81</sup> On this view, the right to retain the deposit survives termination because it is an accrued contractual right and, as such, falls beyond the purview of restitution. This does not accord with the traditional understanding of the reciprocal obligations in this type of case. A simpler explanation is to see this as a case where the terms of the contract exclude the contract breaker's right to restitution.<sup>82</sup>

Regarding the scope of the *condictio causa data causa non secuta*, Lord Morison stated that a breach of contract by the party who paid the deposit does not per se affect the equity of a claim for restitution of that payment.<sup>83</sup> This *obiter dictum* has been welcomed by the commentators as a justifiable criticism of Lord Marnoch's approach.<sup>84</sup> Furthermore, Evans-Jones has argued, rightly, that it is incorrect to link the availability of the right to restitution with the scope of one of the enrichment actions.<sup>85</sup>

### (iii) *The Position in Principle*

In line with the view that the aggrieved party is under a corresponding duty to

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<sup>80</sup> *Zembunt (Holdings) Ltd v Control Securities plc* 1992 SC 58 at 66-7.

<sup>81</sup> Hogg, *Obligations* (2003), para. 4.90.

<sup>82</sup> For a discussion of this issue more generally see Beatson, 'Restitution and Contract: Non-Cumul?' (2000) 1 *Theoretical Enquiries in Law* 83.

<sup>83</sup> 1992 SC 58 at 70.

<sup>84</sup> Stewart, 'Unjust Enrichment and Equity' 1992 *SLT (News)* 47 at 50 and Evans-Jones, 'The claim to recover what was transferred for a lawful purpose outwith contract (*condictio causa data causa non secuta*)' (1997) *AJ* 139 at 166.

<sup>85</sup> Evans-Jones, (1997) *AJ* 139 at 166.

make counter-restitution when claiming restitution himself, it is correct in principle that the contract breaker has the right to restitution of the contract price. It would clearly be indefensibly punitive if the aggrieved party was simultaneously entitled to claim restitution of his performance and allowed to retain the contract price.<sup>86</sup> This is the policy underlying the duty to make counter-restitution. As Evans-Jones puts it:

‘... the innocent party who has rescinded must give restitution since otherwise he will be able to retain the benefit of the contract while having chosen not to render his agreed counter-performance. He is protected from any loss attributable to the breach by a claim of damages.’<sup>87</sup>

The fact that restitution also prevents the aggrieved party being unjustifiably enriched does not mean that this purpose cannot be accommodated by a contractual rule.<sup>88</sup> By terminating the contract, the aggrieved party is saying that he is no longer prepared to be in a contractual relationship with the contract breaker and that he wants restitution of his performance. It is only just that he simultaneously returns the purchase price, subject to his claim for damages. In no case will the law be enhanced by regarding the contract breaker’s restitution claim as an enrichment remedy.

Finally, the contract breaker will never be able to escape the consequences of a bad bargain by claiming restitution as the aggrieved party will always be entitled to set off his damages claim against this restitution claim.<sup>89</sup>

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<sup>86</sup> Until relatively recently, some common law jurisdictions have denied the contract breaker recovery of payments made prior to breach. This was seen by most commentators as indefensibly harsh and has led to a change in the law. For a comparative overview see England, ‘Restitution of Benefits Conferred without Obligation’ in Schlechtriem (ed), *International Encyclopaedia of Comparative Law* (1991), §148-150.

<sup>87</sup> Evans-Jones, (1997) *AJ* 166. For a similar view see also Gloag, *The Law of Contract* (1929), 59.

<sup>88</sup> See for example *Cash Converters Southern Africa v Rosebud W/P Franchise* 2002 (5) 494 (SCA) at 510 where it is stated that the aim underlying the relaxation of the requirement of exact restitution is to prevent unjustified enrichment.

<sup>89</sup> *Radiotronics (Pty) Ltd v Scott Lindberg & Co. Ltd* 1951 (1) SA 312 (C) at 355; *Van Heerden v Sentrale Kunsmiskorporasie (Edms) Bpk* 1973 (1) SA 17 (A); and De Vos, *Verrykingsaanspreklikeid* (1987), 158.

## 5.4 Restitution of Money from a Third Party

### 5.4.1 The Issue

The final issue in this chapter concerns the aggrieved party's claim for restitution of money against a third party (i.e. someone other than his co-contractant). Restitution claims between co-contractants raise questions about the choice between defensible doctrinal alternatives. As there is no contractual nexus between the aggrieved party and the third party, this restitution claim can only be an enrichment remedy. This raises questions about the role of the contractual matrix in determining the availability a contractant's enrichment-based restitution claim against a third party.

### 5.4.2 Case Law in Scotland and England

Although South African law has not yet considered this issue, it has come before the English and Scottish courts. The two leading cases are respectively *Pan Ocean Shipping Co. Ltd v Credit Ltd 'The Trident Beauty'*<sup>90</sup> and *Compagnie Commercial Andre SA v Artibell Shipping Company Ltd.*<sup>91</sup> The facts in both cases were similar. In terms of a charter-party agreement, the hirer was obliged to make an advance payment of freight. As freight is earned on completion of the voyage, the parties agreed that if this did not occur for a reason outside the agreed upon perils, the owner would be obligated to repay the unearned freight. In order to finance their shipping operations, the owner

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<sup>90</sup> [1994] 1 WLR 161.

<sup>91</sup> 2001 SC 653. For two Sheriff Court decisions see *Binstock Miller & Co. v Coia & Co.* 1957 SLT (Sh Ct) 47 and *Alex Lawrie (Factors) Ltd v Mitchell Investments (Pty) Ltd* 2001 SLT (Sh Ct) 93.

validly assigned the right to receive freight payments to a financial institution. As required by the assignation, the hirer paid the advance freight to the financial institution. The voyage was not completed as a result of a breach by the owner. The hirer terminated the contract. As the clear contractual right to claim restitution of the advance freight was not worth pursuing against the owner, the hirer brought an action in unjustified enrichment against the financial institution. This claim was refused in both cases.

In *Pan Ocean Shipping Co.* Lord Goff dismissed the claim on the basis that the contractual regime excluded a restitution claim against the financial institution. It was stated that it would be unfair to undermine the contract of assignment (between the owner and the financial institution) in terms of which the financial institution had bought the right to payment of the hire free of any condition as to repayment by the owner.<sup>92</sup> The net result was that the hirer was left to pursue his restitution claim against the owner.

In *Compagnie Commercial Andre SA* Lord MacFadyen dismissed the claim on the basis that the financial institution was not enriched by the hirer's payment. This was because the payment of the advance freight was received in their capacity as the owner's bankers rather than on their own account.<sup>93</sup>

Lord MacFadyen did, however, consider (*obiter*) whether the outcome would have been the same if the enrichment requirement had been met. The critical issue was

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<sup>92</sup> Lord Woolf dismissed the claim on the basis that a claim for failure of consideration could only be brought against the party who was responsible for that failure. This argument has rightly been criticised by the commentators as being based on the privity of contract fallacy which overlooks the fact that the cause of action in unjustified enrichment is conceptually distinct. *Pan Ocean Shipping Co. Ltd v Credit Ltd 'The Trident Beauty'* [1994] 1 WLR 161 at 170. See also Visser, 'Searches for Silver Bullets: Enrichment in Three-Party Situations' in Johnston and Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 526 at 549 and Burrows, *The Law of Restitution* (2002), 349.

<sup>93</sup> The assignation in this case was not an absolute assignation but merely an assignation in security: *Compagnie Commercial Andre SA v Artibell Shipping Company Ltd* 2001 SC 653 at 661-2.



the *sine causa* requirement. In order to determine whether there was a justification for the retention of the benefit, Lord MacFadyen stated that it is

‘... necessary to examine and take into account the whole circumstances including not only the shipping transaction between the pursuers and the first defenders, but also the financing transaction between the second defenders and the first defenders.’<sup>94</sup>

In giving substance to this dictum, Lord MacFadyen considered three factors. First, Lord MacFadyen stated that the contractual regime, which regulated the payment of the advance freight and the return of unearned freight, normally excluded a claim in unjustified enrichment designed to achieve the same result.<sup>95</sup> This echoes Lord Goff’s reason for dismissing the claim in *Pan Ocean Shipping Co. Ltd.*

Secondly, Lord MacFadyen stated that as the hirers were aware at the time of making payment that the financial institution had not assumed an obligation to repay the advance freight, it was for them to assess the commercial risk involved in making this payment to the assignee (the financial institution) when the obligation to repay, if it arose, remained with the owners.<sup>96</sup> This is not entirely convincing. Once the right to receive the advance payment has been validly assigned, the hirer, in order to discharge his obligation, has no choice but to make payment to the assignee. Any other course of action will result in a breach of contract.

Thirdly, it was held that the payment to the financial institution did not result in their receiving an ‘unexpected windfall’ but was part of a deal whereby the financial institution provided finance to the owners to facilitate their shipping business.<sup>97</sup>

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<sup>94</sup> *Compagnie Commercial Andre SA v Artibell Shipping Company Ltd* 2001 SC 653 at 669.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Compagnie Commercial Andre SA v Artibell Shipping Company Ltd* 2001 SC 653 at 670.

<sup>97</sup> *Ibid.*

Accordingly, Lord MacFadyen held that the retention of the payment was not *sine causa*.<sup>98</sup>

### 5.4.3 Academic Commentary and a Proposed Solution

This tricky issue has divided the academic commentators. Two main arguments are put forward by those who support the decisions. First, if the hirers are allowed an enrichment claim against the financial institution, this would unjustifiably allow them to escape the risk of insolvency which necessarily flows from their contract with the owners.<sup>99</sup> The point is that the law of enrichment ought not to allow parties to escape the risk allocation envisaged by a contractual relationship.

Secondly, it is argued that the decision would upset the contractual assignment in terms of which the financial institution had effectively purchased the right to the hirer's contractual payments.<sup>100</sup> The point is that allowing the claim will undermine the certainty of the assignee's receipt of the payment.

It is with this second argument that commentators who oppose the decisions have taken issue. Barker argues that since the financial institution's right to payment was not purchased from the hirers, this has no bearing on the latter's unjustified enrichment action.<sup>101</sup> The claim is that as an independent cause of action, it ought to make no difference to the success of an unjustified enrichment claim that the financial institution

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<sup>98</sup> *Compagnie Commercial Andre SA v Artibell Shipping Company Ltd* 2001 SC 653 at 671.

<sup>99</sup> Birks, *Unjust Enrichment* (2003), 78 and Friedmann, 'Restitution from an Assignee' (1994) 110 *LQR* 521 at 523.

<sup>100</sup> Burrows, *The Law of Restitution* (2002), 350 and Burrows, 'Restitution from Assignees' (1994) 2 *RLR* 52 at 55.

<sup>101</sup> Barker, 'Restitution and Third Parties' (1994) *LMCLQ* 305 at 310. The effect of this on his argument is clear from his conclusion where it is said that '[s]omewhere among all this complexity, the basis of Pan's cause of action (the vitiation of their consent) has been forgotten, or confused.'

had entered into a contract with the ship owner. In my view, this is another example of an abstract taxonomic argument and is subject to the same criticisms raised in chapter four.<sup>102</sup>

On a different tack, Tolhurst raises three points: first, the courts paid too much attention to the repayment obligation and insufficient attention to the payment obligation. In his view, the right assigned was conditional on the freight being earned.<sup>103</sup> Secondly, this type of case is not analogous to the case where a subcontractor performs under a contract with the main contractor and then seeks to claim against the owner of the property (i.e. it is not a case where A confers a benefit on C in the course of performing a contractual obligation with B). It is rather a case of A performing an obligation which is owed to C by virtue of the assignment between B and C.<sup>104</sup> Thirdly, the legal relations created by assignment bind the parties not to act unconscionably. From these three points, Tolhurst concludes that

‘[i]t seems unconscionable for the assignee to insist on its prima facie right to payment, which always remained conditional, and then effectively deny the conditional nature of the right when it turns out that it was not earned.’<sup>105</sup>

Although Tolhurst favours allowing the claim, he does, however, concede that the hirer must first exhaust his remedies against the owner.<sup>106</sup>

Leaving aside the abstract taxonomic argument, all the commentators use the underlying contractual matrix to decide whether the enrichment is unjustified. I have

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<sup>102</sup> See sections 4.4.4(ii)(b) and (d).

<sup>103</sup> Tolhurst, ‘Assignment, Equities, *The Trident Beauty* and Restitution’ (1999) *CLJ* 546 at 552.

<sup>104</sup> Cf Visser, ‘Searches for Silver Bullets: Enrichment in Three-Party Situations’ in *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 548; Watts, ‘Does a Subcontractor have restitutionary rights against the employer?’ (1995) *LMCLQ* 398; and Burrows, (1994) 2 *RLR* 53-4.

<sup>105</sup> Tolhurst, (1999) *CLJ* 560.

<sup>106</sup> *Ibid.*

argued elsewhere (with Daniel Visser) that this is the right way to resolve this type of case.<sup>107</sup> We argued that a legal system must make what we called a ‘first tier’ policy decision about whether this type of case is one in which this fact constellation represents an instance where the enrichment is to be regarded as *sine causa*. This is typically a decision a legal system makes once, which then hardens into a principle and is thereafter not easily changed.<sup>108</sup> If the first tier decision favours liability, we argued that the courts must then take policy factors into account on a secondary level to decide whether a claim based on unjustified enrichment ought to succeed ‘in the particular circumstances of the case at hand’.<sup>109</sup> In my view, it is the policy factors on this second level that ought to determine whether the hirer should succeed against the financial institution.

What factors should be taken into account? On the one hand, it does seem unfair that the hirer can escape the consequences of insolvency as a fortuitous result of having a third party against whom to seek redress. This is not because the equilibrium between the creditors will be disturbed as result of the claim. In fact, allowing the claim has no impact on the amount available for distribution as it will either be the hirer or the financial institution who ranks for the amount repayable. The unjustness arises because the hirer can escape his contractual risks by the fortuitous act of assignation. This policy factor emerges from the contractual relationship between the hirer and the owner.

On the other hand, it does not appear as intuitively unjust to allow the financial institution to retain the funds received as a result of the valid assignation. In terms of this assignation contract, the financial institution is receiving precisely what it bargained

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<sup>107</sup> Visser and Miller, ‘Between Principle and Policy: Indirect Enrichment in Subcontractor and Garage Repair Cases’ (2000) 117 *SALJ* 594.

<sup>108</sup> Visser and Miller, (2000) 117 *SALJ* 605. An example of this type of ‘first tier’ policy decision is whether negligent misstatements ought to attract delictual liability.

<sup>109</sup> Visser and Miller (2000) 117 *SALJ* 606.

for. As the trigger to the right to repayment is the non-performance of the charter-party contract, it seems right in these circumstances that the two original contracting parties are left to resolve their dispute. This is reinforced by the fact that the hirer is now in no worse position than he would have been in had there been no assignation.

On balance, the policy factors indicate that it is more convincing to prevent the hirer from claiming in unjustified enrichment as against the financial institution.

Although the issue here does not concern a choice between defensible doctrinal alternatives, an analogous theme emerges. In deciding whether this enrichment claim ought to succeed, it was argued that abstract taxonomic factors are not decisive. Instead, clearly articulated policy factors derived from the two contractual relationships ought to decide whether the retention of the payment is unjustified for the purposes of a contractant's enrichment-based restitution claim against a third party.

## **5.5 Doctrinal Basis of Restitution of Returnable Benefits and Restitution of Money: A Summary**

In respect of claims for restitution of returnable benefits and for restitution of money it was argued that in the majority of cases it makes no difference whether these restitution claims are seen as contractual or enrichment-based. The tricky case is where the aggrieved purchaser of goods cannot return these goods to the seller in circumstances where he is not to blame for this eventuality. As the arguments favoured upholding the ordinary contractual risk rules in these cases, it was submitted that it makes sense to leave it to the law of contract to resolve such cases. Accordingly, there is no good reason to change the existing South African law which regards claims for restitution of returnable benefits and for restitution of money as contractual remedies.

In the absence of a definitive statement regarding the doctrinal basis of these restitution claims, it was suggested that Scots law should follow the South African law and treat them as contractual.

## Chapter 6

### Restitution of Inherently Non-Returnable Benefits

#### 6.1 Introduction

The aim of this chapter is to consider the claim for restitution of inherently non-returnable benefits after termination for breach.<sup>1</sup> This restitution claim is more complex than restitution claims for money benefits or returnable benefits because it raises particularly acute valuation problems.

As stated in the introduction to chapter four, the two critical questions that need to be answered are: (a) when does the right to claim restitution arise and (b) when this right arises, what is the quantum of this restitution claim. Many tricky problems lurk beneath the surface of these questions, not least of which is the role the contract price should play in determining the quantum of restitution.

After this introduction, this chapter is divided into three main sections. The first section gives an overview of the doctrinal basis of restitution of inherently non-returnable benefits in South African and Scots law. The second section deals with the availability of this restitution claim and the third section considers its quantum. The analysis of the doctrinal basis of restitution will be woven into the analysis of the two questions under review.

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<sup>1</sup> As *quantum meruit* claims raise identical issues, these claims will also be considered in this chapter.

## 6.2 Doctrinal Basis of Restitution of Inherently Non-Returnable Benefits

The doctrinal basis of restitution in South African law presents a curious asymmetry. The current position is that where a benefit is, by its nature, intrinsically non-returnable, then both the aggrieved party and contract breaker have a claim in unjustified enrichment for the value of the benefit.<sup>2</sup> Where the benefit conferred is money or intrinsically returnable, then restitution is a distinct contractual remedy.

Although it appears that Scots law also treats a claim for restitution of inherently non-returnable benefits as an enrichment action, the position is not as clearly articulated as the position in South African law. This is largely because there are few instances where enrichment claims have actually been granted by the Scottish courts.<sup>3</sup>

## 6.3 Availability of a Claim for Restitution

Broadly speaking, it will be desirable to allow a restitution claim whenever the recipient of an inherently non-returnable performance retains a benefit after termination for breach. The key to the availability of this restitution claim is identifying precisely what constitutes a benefit. It is necessary to deal separately with two types of inherently

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<sup>2</sup> In respect of a restitution claim for inherently non-returnable benefits, an enrichment action is said to lie for the value of *any* intrinsically non-restorable performance rendered before termination. However, where the performance takes the form of work done or services rendered under a contract of *locatio conductio operis* or *locatio conductio operarum*, the action is known as the 'action for work done and services rendered'. This is one of the established enrichment actions in South African law. Visser, 'Rethinking Unjustified Enrichment: A Perspective of the Competition between Contractual and Enrichment Remedies' (1992) *AJ* 203 at 208 and Hutton, 'Restitution after Breach of Contract: Rethinking the Conventional Jurisprudence' (1997) *AJ* 201 at 206.

<sup>3</sup> MacQueen, 'Unjustified Enrichment and Breach of Contract' (1994) *JR* 137 at 162. The appropriate enrichment action in Scots law is recompense. This action occupies a similar space in Scots law to the action for work done and services rendered in South African law.



non-returnable benefits. The first type is where a performance results in an end product. This will occur, for example, where a contractor constructs a building on a landowner's property or where a contractor digs a moat around a castle owner's property. The second type is where the performance does not yield an end product. This occurs, for example, in a contract to transport one party from A to B; in a contract to provide a holiday or in a contract to provide access to the internet.<sup>4</sup>

The analysis of when a *benefit* is retained after termination for breach does not depend on whether the aggrieved party or the contract breaker is the recipient of the performance. The analysis that follows does not make this distinction.

### 6.3.1 South African Law

#### (i) *Introduction*

As stated above, South African law regards restitution of an inherently non-returnable benefit as an enrichment claim. In order to uncover when the right to restitution arises, it is necessary to consider the circumstances in which the requirements for an enrichment claim are present. It was established in chapter four that there is no doctrinal impediment to meeting the *sine causa* requirement when a benefit is retained after termination for breach. This availability of a restitution claim thus turns on establishing the fact of the recipient's enrichment.

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<sup>4</sup> The second type of benefit also includes those instances where the inherently non-returnable performance is an incidental by-product of a contractual performance. This occurs, for example, if the purchaser of a car validly terminates the contract for breach after having had the use of the car. Although the purchaser can return the actual car, he cannot return the use of that car.

(ii) *Establishing the fact of Enrichment: A Subjective or an Objective Approach*

There are two conflicting views in South African law about establishing a recipient's enrichment. Firstly, Wouter De Vos argues that the fact of enrichment should be established objectively. This means that the question whether something constitutes a benefit is judged from the perspective of a reasonable man (i.e. the market). According to this approach, the recipient of a benefit (where the performance produces an end product) is regarded as automatically enriched by operation of the principle of *accessio* irrespective of whether he accepts the work or makes use thereof.<sup>5</sup> In order to ameliorate any unfairness that this might cause to a recipient who does not utilise the benefit, De Vos states that the recipient may, in certain circumstances, override an objective finding of enrichment with evidence that he has rejected the benefit.<sup>6</sup> De Vos states that the defendant will not always be entitled to rely on this defence of non-enrichment. According to him, it should be left to the court's discretion to adjudicate in each case whether the defence ought to succeed with reference to 'fairness, efficacy and common sense.'<sup>7</sup> De Vos gives the following two examples of instances where the court might exercise this discretion to prevent reliance on the defence: (i) where the defendant has saved some necessary expenditure and (ii) where the defendant has realised the value of the work or where the value of this work is readily realisable.<sup>8</sup>

According to the second approach, the fact of enrichment is established subjectively. This means that the question whether something constitutes a benefit is

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<sup>5</sup> De Vos, *Verrykingaanspreeklikheid in die Suid-Afrikaanse Reg* (1987), 282.

<sup>6</sup> De Vos, *Verrykingaanspreeklikheid* (1987), 289.

<sup>7</sup> De Vos, *Verrykingaanspreeklikheid* (1987), 291.

<sup>8</sup> De Vos, *Verrykingaanspreeklikheid* (1987), 289-92.

judged from the perspective of the particular recipient. This is evident from cases which have held that liability for restitution only arises if there is some evidence of the recipient's intention to accept the contract breaker's performance. From the cases considered below, it appears that South Africa supports the subjective approach.

(a) Inherently Non-Returnable Performances Producing an End Product

The subjective approach to establishing the fact of enrichment is evident in a series of decisions where an aggrieved employer elects not to terminate a contract of *locatio conductio operis* for the contractor's breach. In these cases the employer is entitled to repel the contract breaker's claim for payment by raising the *exceptio non adimpleti contractus*. The courts recognised that this could sometimes have unfair consequences. In a trilogy of early cases (*Hauman v Nortje*,<sup>9</sup> *Breslin v Hichens*,<sup>10</sup> and *Van Rensburg v Straughten*<sup>11</sup>) it was held that a breaching contractor could, in certain exceptional circumstances, claim a *quantum meruit* for his work. This is a claim for a reduced contract price calculated by deducting the cost of remedying the defect (or completing the performance) from the full contract price. The courts in the above cases appeared to regard this claim as an enrichment remedy.<sup>12</sup> Although there are subtle differences between the tests used to establish the fact of enrichment in these cases, all three required the aggrieved party to accept the defective performance in order to attract liability.<sup>13</sup> This acceptance was established by the aggrieved party's utilisation of the

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<sup>9</sup> 1914 AD 293.

<sup>10</sup> 1914 AD 312.

<sup>11</sup> 1914 AD 317.

<sup>12</sup> *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) has subsequently held that this claim is contractual.

<sup>13</sup> For example, in addition to the utilisation requirement, Maasdorp AJA in *Van Rensburg v Straughten* appears to include an objective element into the test when he says that the court must take into account the increase in value to the aggrieved party's land. See *Van Rensburg v Straughten* 1914 AD 317 at 329-33.

benefits conferred.

In commenting on these cases, Jansen JA in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* stated that the term ‘acceptance’ is a slippery one and that the prerequisite for the denying the aggrieved party the *exceptio non adimpleti contractus* is rather the *utilisation* of the defective or incomplete performance.<sup>14</sup>

A case actually involving termination for breach is *Sacher v African Canvas & Jute Industries Ltd.*<sup>15</sup> The contract breaker excepted (the South African equivalent of a plea to the relevancy in Scots law) to the termination on the grounds that the aggrieved party had not tendered restitution. The court dismissed the plea on the basis that there was nothing to indicate that the aggrieved party had accepted the contract breaker’s performance either expressly or impliedly by taking the benefit of the contractual performance with the knowledge of their defects.<sup>16</sup>

A difficult case for the subjective approach to establishing the fact of enrichment is where the recipient elects not to utilise a benefit that enhances the value of his estate. This will be considered in section 6.3.3 below.

#### (b) Inherently Non-Returnable Performances not Producing an End Product

The starting point is *Spenser v Gostelow*.<sup>17</sup> Innes CJ held that an aggrieved employer was obliged to compensate an employee for services rendered that fell outside the accrued rights doctrine. The court considered that as the employer had benefited

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For an excellent analysis of the differences between the three cases see Jansen JA in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 421-2 (translation).

<sup>14</sup> *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 410 (translation).

<sup>15</sup> 1952 (3) SA 31 (T).

<sup>16</sup> 1952 (3) SA 31 (T) at 35-6.

<sup>17</sup> 1920 AD 617.

from the service on a daily basis, it would be unjustifiably enriching itself if the contract breaker was not granted a restitution claim.<sup>18</sup> As the breach did not involve the delivery of a defective performance, it could be argued that the employer had received what he bargained for under the contract.

Establishing the fact of enrichment with reference to the acceptance test (as evidenced by utilisation of the defective performance) has recently been extended to services cases. In *Masters v Thain t/a Inhaca Safari* the aggrieved party contracted to go on holiday on the express undertaking that there would be scuba diving facilities available.<sup>19</sup> On arrival at the destination, it transpired that there were no such facilities. The aggrieved party immediately terminated the contract and requested to be flown home. The first available flight home was four days after the date of arrival.<sup>20</sup> The court upheld the aggrieved party's claim for restitution of the purchase price. In so doing, the court asked whether the contract breaker was entitled to any compensation for the aggrieved party's use of some of the facilities whilst he was at the destination. According to Horowitz AJ no such compensation was payable because

'[t]his was not a case in which the plaintiff [the aggrieved party], when he ascertained that diving facilities were not available, simply adopted a complacent attitude and accepted less than he contracted for. At the first opportunity, which was the very evening that he and his family arrived on the island, the plaintiff made his disapproval known to the defendant and rejected any notion of staying on the island for a moment longer than was necessary. ... The fact that the ... plaintiff had to wait some four days for a flight out was not the plaintiff's problem. ... Ordinarily, in the case of cancellation of a contract, each party must return to the other that which was received pursuant to the contract. That rule, however, must be tempered by the corollary that, if either party ... was obliged, against his will, to utilise some of the service rendered under the contract whilst awaiting fulfilment by the defendant of her obligations which befell her upon

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<sup>18</sup> For a full discussion of this case in the context of accrued rights see section 3.2.1(ii).

<sup>19</sup> 2000 (1) SA 467 (W).

<sup>20</sup> For the facts see *Masters v Thain t/a Inhaca Safari* 2000 (1) SA 467 (W) at 468-9.

cancellation of the contract, then redelivery or compensation for the service thus utilised is excused.<sup>21</sup>

This dictum establishes that mere utilisation of the benefits under a contract is sometimes not sufficient to attract liability for restitution. In cases where it is not possible to reject the performance immediately, liability for restitution will be triggered if the utilisation is coupled with a voluntary intention to accept the defective benefits.<sup>22</sup> Intention in this context has a more limited meaning than the intention required to establish the formation of a contract. Although the holidaymaker would not have entered into a contract for a holiday without scuba diving facilities, they would have incurred some liability if they had made the best of it and stayed at the resort for the duration of the holiday.

This category also includes those cases where the inherently non-returnable benefit arises as an incidental consequence of performance. This occurs, for example, when a purchaser uses a defective car prior to termination for breach. Recently, the South African courts have held that the aggrieved party's use of the car is counterbalanced by the contract breaker's use of the purchase price and that a 'meticulous readjustment' of the economic interest between the parties was not necessary.<sup>23</sup> Once again, utilisation of the benefit triggers restitution. Restitution is justified in these cases because the aggrieved party has saved an expense by having had the use of the car.<sup>24</sup>

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<sup>21</sup> *Masters v Thain t/a Inhaca Safari* 2000 (1) SA 467 (W) at 474-5. It would be unfair to expect the holidaymaker to stay in his hotel room for the period he was at the destination. For a similar case see *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W).

<sup>22</sup> This aligns with the approach adopted in *Ambrose & Aitken v Johnson & Fletcher* 1917 AD 327 at 343 where the court said that the aggrieved party is free to reject the incomplete or defective performance and in so doing avoid enrichment liability.

<sup>23</sup> *Katzeff v City Car Sales* 1998 (2) SA 644 (C) at 654.

<sup>24</sup> Where the contract breaker is the owner of the car, he is the proper restitution claimant. Where, however, the purchaser has been evicted from possession by the true owner (i.e. someone other than the seller), that party, rather than the seller, is the proper restitution claimant.

### 6.3.2 Scots law

#### (i) *Introduction*

Although it has been stated that Scots law regards the claim for restitution of an inherently non-returnable benefit as an enrichment remedy, there is little direct authority.<sup>25</sup> The cases, such that there are, deal predominately with inherently non-returnable benefits that produce an end product. It is not settled whether Scots law follows a subjective or an objective approach to establishing the fact of the defender's enrichment.<sup>26</sup>

#### (ii) *Inherently Non-Returnable Performances Producing an End Product*

The point of departure in Scots law is *Ramsey v Brand*.<sup>27</sup> The case involved a building contract. It was held that as the builder's breach was minor, he was entitled to the contract price less the cost of rectifying the defect. In an important *obiter dictum*, Lord President Robertson stated as follows:

'[i]f on the other hand, the proprietor made the best of it and let the house stay, the only claim which the contractor could have would be a claim of recompense; and this be it observed, would be not for *quantum meruit* the builder, but for *quantum lucratus est* the proprietor. Accordingly, when contractors do not stick to their contracts they not only unmoor themselves from their contract rights, but they drift into much less certain and much less definite claims.'<sup>28</sup>

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<sup>25</sup> MacQueen, (1994) JR 162 and MacQueen, 'Unjustified Enrichment' in Ashton *et al.* (eds), *Fundamentals of Scots Law* (2003), para. 8.39.

<sup>26</sup> For a discussion of the 'enrichment' requirement in Scots law see Evans-Jones, *Unjustified Enrichment* (2003), paras 7.01-20.

<sup>27</sup> (1898) 25 R 1212 and (1898) 35 SL Rep 927.

<sup>28</sup> (1898) 25 R 1214. Although Lord President Robertson did not cite any authority for this statement, MacQueen suggests that he was influenced by the following statement by Lord President Inglis: 'No doubt, if [the builder] perform a part and then fail in completing the contract, I shall be bound in equity

This statement can be taken as tangential authority that a restitution claim in Scots law, like South African law, is triggered by the utilisation of the defective performance. This utilisation might occur, for example, where the employer uses the defective building work to complete the project. This occurred in *Bank of East Asia Ltd v Scottish Enterprise*.<sup>29</sup> It was pointed out in section 3.3.2(ii) that the case should have been resolved by granting the contract breaker a restitution claim for the value of the defective work utilised by the aggrieved party to complete the project.

In order to present a complete picture of Scots law, it is necessary to consider four further cases. In *Steele v Young* a contractor used milled lime instead of the contractually stipulated cement mortar to build a house.<sup>30</sup> The only way of repairing the defect was to knock the house down and to rebuild it with the correct material. The contractor instituted a claim for the purchase price. The problem was that if the court applied the cost of cure formula set out in *Ramsey v Brand*, the employer would have gained a house for free as the cost of curing the defect was greater than the contract price. For this reason, the court was understandably reluctant to apply *Ramsey v Brand*. Instead, they held that a party in breach is prevented from suing for the contract price.<sup>31</sup> Although the claim for the contract price was rejected, the court was at pains to stress (*obiter*) that this did not preclude the contractor from suing the employer to the extent that the latter was unjustifiably enriched by the contractor's work.<sup>32</sup>

In *Forrest v Scottish County Investment Co. Ltd* a builder instituted a claim for the outstanding part of the purchase price and the employer sought to repel this claim on the

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to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further...' *Watson v Shamkland* (1871) 10 M 142 at 152. MacQueen, (1994) JR 153.

<sup>29</sup> 1997 SLT 1213 (HL).

<sup>30</sup> 1907 SC 360.

<sup>31</sup> This rule derives from the principle of mutuality. For a discussion and criticism of this rule see section 3.3.2.

<sup>32</sup> *Steele v Young* 1907 SC 360 at 366.



basis that the building work was defective.<sup>33</sup>

In the lower court, Lord Hunter upheld the claim by finding that the contract had not been breached. He did, however, go on to say that had the contract been breached, he would have allowed a claim in unjustified enrichment for the same amount. If the court was referring to a situation where the contract was terminated for breach, then this *obiter dictum* can be taken as authority that restitution after termination for breach is enrichment-based.

Although the First Division upheld the builder's claim, it did so by holding that the contractor was entitled to the contract price subject to a deduction on a the cost of cure basis. Lord President Stathclyde stated that if there is a material breach of contract coupled with a refusal of the work, then the claim on the contract fails. Interestingly, he does not mention the possibility of a claim in unjustified enrichment. This is potentially problematic as the aggrieved party might end up with an unjustifiable windfall gain.<sup>34</sup> For present purposes the case must be treated with caution as it did not involve a termination for breach.<sup>35</sup>

It is clear from both decisions in *Forrest* and the decision in *Ramsey* that the courts were at pains to let contract law provide the solution to these types of cases.

The next case is *P.E.C. Barr Printers Ltd v Forth Print Ltd*.<sup>36</sup> After delivering half of the typesetting work required by the contract, Barr Printers were unable to complete the remainder of the work by the contractually stipulated time for performance. As a result, Forth Print terminated the contract for breach and completed the work

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<sup>33</sup> 1915 SC 115; affirmed 1916 SC (HL) 28.

<sup>34</sup> *Forrest v Scottish County Investment Co. Ltd* 1915 SC 115.

<sup>35</sup> The House of Lords decision in *Forrest v Scottish County Investment Co. Ltd* 1916 SC (HL) 28 does not say anything about the difference of opinion between Lord Hunter and Lord President Strathclyde on the availability of an enrichment claim in cases where the contractor is debarred from claiming on the contract.

<sup>36</sup> 1980 SLT (Sh Ct) 118.

themselves. Barr instituted a restitution claim for the value of the work completed. Forth, in turn, counter-claimed for damages. Both claims were upheld. In respect of Barr's restitution claim, Sheriff Ireland held that it was not founded on recompense (one of the enrichment remedies in Scots law) but was rather a *quantum meruit* claim. This claim was said to be based on an implied contract to pay the market rate for the work actually completed.<sup>37</sup> The court justified this conclusion on the basis that Forth Print Ltd had the choice whether to accept or reject the work completed at the date of termination. The court distinguished this case from a case where a landowner has defective building work constructed on his land on the basis that the landowner has no choice but to make the best of it and is liable to pay only to the extent of his enrichment (*quantum lucratus*). According to the court, this is measured by the increase in the value of the land. This was said to contrast with a *quantum meruit* claim as this claim is measured by the market value of the work. The court held that the best evidence of this market value was the contract price between the parties.<sup>38</sup>

This judgment raises a number of points. First, as MacQueen has pointed out, the idea behind the implied contract analysis is suspect in that it is not clear that the parties' conduct evidences *consensus ad idem*. According to this reasoning, the trigger for a restitution claim is something more than the mere utilisation of the benefit as it appears to include an intention to accept the benefit where intention appears to mean the intention to be bound in contract.<sup>39</sup> This overlooks the significant damage that the implied contract theory has inflicted on the English law of unjustified enrichment. The authors in that jurisdiction have rightly rejected this approach and Scots law ought to

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<sup>37</sup> *P.E.C. Barr Printers Ltd v Forth Print Ltd* 1980 SLT (Sh Ct) 118 at 122.

<sup>38</sup> *Ibid.*

<sup>39</sup> MacQueen, (1994) JR 160-1.

avoid similar pitfalls.<sup>40</sup>

Secondly, the reason Sheriff Ireland wanted to keep the restitution claim outside the enrichment fold was because he sought to value the benefit at the market rate (*quantum meruit*) rather than the extent to which Forth Print Ltd was enriched (*quantum lucratus*). James Wolffe has pointed out that there is not necessarily a difference between these two measures as *quantum lucratus* can incorporate *quantum meruit*. This is because a recipient of a benefit can be enriched by the extent to which his estate has been saved from incurring the expense necessary to procure a service.<sup>41</sup> This establishes that Sheriff Ireland's reason for not regarding the restitution claim as an enrichment remedy is unconvincing.<sup>42</sup>

Even though the reasoning in this case is suspect in parts, it is not inconsistent with the view that restitution is triggered by the utilisation of the defective or incomplete performance. As we saw in section 6.3.1(ii)(b), the additional requirement of intention to accept the defective performance is only necessary when the aggrieved party does not have the opportunity to reject a benefit forthwith.

The final case, *ERDC Construction Ltd v HM Love & Co.*,<sup>43</sup> involved a contract to repair a building. The court confirmed that if a contract has been terminated for breach, the aggrieved party can, as an alternative to damages, institute a *quantum meruit* claim to recover for work carried out under the contract. This *quantum meruit* was said to be a claim at a reasonable or ordinary rate.

Although Wolffe has noted that a claim for *quantum meruit* has a contractual

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<sup>40</sup> For a discussion of the implied contract theory see Birks, *An Introduction to the Law of Restitution* (1989), 29-39.

<sup>41</sup> Wolffe, 'ERDC Construction Ltd v HM Love & Co' (1997) 1 *Edin LR* 469. See also MacQueen, (1994) *JR* 161 and Whitty and Visser, 'Unjustified Enrichment' in Zimmermann, Visser and Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004), 399 at 408.

<sup>42</sup> MacQueen, (1994) *JR* 161 says that it ought to have been treated as a claim for recompense.

<sup>43</sup> 1995 SLT 254.

connotation for Scots lawyers, the matter cannot be regarded as finally settled.<sup>44</sup> This is for two reasons. First, the court was not forced to decide this issue as the contract in question had not been terminated and secondly, the quantum of a *quantum meruit* claim can be equivalent to what can be claimed under an enrichment action.<sup>45</sup> This, as Wolffe argues, makes it doctrinally possible to classify the *quantum meruit* claim as an enrichment remedy.<sup>46</sup>

As *quantum meruit* claims deal with compensating a contracting party for work carried out under a contract subsequently terminated for breach, it is clear that the issues raised about its doctrinal basis and its quantum are identical to those raised in respect of restitution claims generally. Accordingly, the conclusions reached in respect of these issues will be taken to apply equally to *quantum meruit* claims.

Like South African law, Scots law has not considered the case where the benefit increases the value of the aggrieved party's estate but is not utilised by that party.

### (iii) *Inherently Non-Returnable Performances not Producing an End Product*

The leading Scottish case in this category is *Graham v United Turkey Red*.<sup>47</sup> This case is discussed in section 6.3.3(iv) below.

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<sup>44</sup> Wolffe, (1997) 1 *Edin LR* 474.

<sup>45</sup> As the contract in *ERDC Constuction Ltd* had not been terminated for breach, the court refused to award the *quantum meruit* claim. For a case in which the claim was actually awarded see *Fox v Hendrie* 1996 GWD 27-1570.

<sup>46</sup> Wolffe, (1997) 1 *Edin LR* 473-7. Indeed, MacQueen argues that this claim ought to be regarded as an enrichment claim. MacQueen, (1994) *JR* 137 and MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (1997), 199 at 222.

<sup>47</sup> 1922 SC 533.

### 6.3.3 The Trigger for a Restitution Claim: Lessons from the Common Law

A number of points emerge from the analysis of the case law in South Africa and Scotland. Where the inherently non-returnable performance produces an end product, utilisation is the appropriate trigger for a restitution claim. If restitution were not awarded in these circumstances, the recipient would unjustifiably be left with windfall benefit after termination for breach.

In cases where the inherently non-returnable performance does not yield an end-product, we saw that mere utilisation of the benefit is sometimes not sufficient. This is because the aggrieved party can be in a situation where he has no choice but to utilise some of the performance. Accordingly, restitution in these cases will only be triggered where utilisation is coupled with a voluntary intention to accept the benefits. On close inspection this is actually the same test that applies to inherently non-returnable benefits yielding an end product since utilisation in these cases necessarily incorporates a voluntary intention to accept the benefits in question.

In employment contracts restitution claims for services rendered are justified because the aggrieved party can sometimes be said to have received what he bargained for under the contract.<sup>48</sup> This is unproblematic in cases, such as *Spenser v Gostelow*, where the breach is unrelated to the content of the performance rendered.<sup>49</sup>

An alternative justification is, however, necessary in cases such as *Graham v United Turkey Red* where the breach is caused by defective performance.<sup>50</sup> I will return to this below.

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<sup>48</sup> We are concerned here with those claims relating to performances that fall outside the doctrine of accrued rights.

<sup>49</sup> 1920 AD 617. See section 6.3.1(ii)(b).

<sup>50</sup> 1922 SC 533.

Although South African and Scots law have solved some of the problems regarding the appropriate trigger for restitution of inherently non-returnable benefits, a number of gaps still remain. This is partly due to the fact that neither jurisdiction has considered the notion of benefit in any great depth. In the wake of the intense interest in unjustified enrichment in English law, much useful work has been done in this regard. This analysis goes a long way to plugging the gaps in South African and Scots law.

(i) *Establishing the fact of Enrichment in English Law*

Although it appears that English law adopts a basically subjective approach to establishing a recipient's enrichment, this does not mean that idea of 'objective benefit' (in the market value sense) does not play an important role. Indeed, as Burrows notes, '[t]he outer parameters of the law of restitution have been fixed by the notion of an objective benefit qualified by downward subjectivity only'.<sup>51</sup> This means that only objective benefits can enrich a recipient.

(ii) *Objective Benefits*

It is now well established that objective benefits can be positive or negative. The receipt of a positive objective benefit causes an increase in a person's patrimony. A negative objective benefit is the saving of an expense that would reasonably have been incurred.<sup>52</sup>

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<sup>51</sup> Burrows, *The Law of Restitution* (2002), 24.

<sup>52</sup> Burrows, *The Law of Restitution* (2002), 16.

Two issues about objective benefits have caused disagreement amongst the commentators: first, whether pure services (i.e those which do not result in an end product) can ever be an objective benefit and second, whether a service must actually be received to qualify as an objective benefit.

In respect of the former, Beatson has argued that pure services are not objective benefits unless they save necessary expenditure.<sup>53</sup> This argument has been rejected, rightly in my view, as it goes against common sense to say that a person has not benefited when he listens to Mozart's Requiem or has his household items transported to a new house.<sup>54</sup>

In respect of the latter, Burrows has argued that '[p]rior to receipt no-one could reasonably consider services beneficial. No rational person would pay ... for services that he ... did not receive.'<sup>55</sup> This not only accords with common sense but also creates a clear cut off point as to when an objective benefit has been received.<sup>56</sup> Accordingly,

'... where the services comprise the cutting of hair or the removal of waste or the giving of a rock concert or the writing of a book or the building of a house the defendant can be said to be objectively benefited when, respectively, and subject to a *de minimis* threshold, locks of his hair are cut, items of waste are removed, the rock concert commences, the first part of the book is received and the first part of the building is erected.'<sup>57</sup>

The establishment of an objective benefit is only the starting point. In respect of non-monetary benefits, it is always open to the recipient of an objective benefit to argue

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<sup>53</sup> Beatson, 'Benefit, Reliance, and the Structure of Unjust Enrichment' in Beatson (ed), *The Use and Abuse of Unjust Enrichment* (1991), 21 at 31ff.

<sup>54</sup> See for example Barker, 'Riddles, Remedies, and Restitution: Quantifying Gain in Unjust Enrichment Law' (2001) 54 *CLP* 255 at 265 and Burrows, *The Law of Restitution* (2002), 17.

<sup>55</sup> Burrows, *The Law of Restitution* (2002), 17. For arguments which claim that the receipt of a benefit is not strictly necessary see Birks, 'In Defence of Free Acceptance' in Burrows (ed), *Essays on the Law of Restitution* (1995), 105 at 140-1 and Barker, (2001) 54 *CLP* 255 at 266.

<sup>56</sup> See also Skelton, *Restitution and Contract* (1998), 12 who prefers Burrows' position.

<sup>57</sup> Burrows, *The Law of Restitution* (2002), 17.

that a benefit was of no value *to him* (i.e. to the particular recipient). This has been coined 'subjective devaluation' by Birks.<sup>58</sup>

### (iii) *Subjective Devaluation*

The critical question that arises here is when should the recipient of a benefit be prevented from claiming subjective devaluation of that benefit. Three tests have been developed by the English commentators to answer this question: incontrovertible benefit, free acceptance and bargained-for benefit.

#### (a) **Incontrovertible Benefits**

The idea underlying the incontrovertible benefit test is that some benefits are so obviously enriching that

'... any recourse to subjective devaluation would be so absolutely unreasonable that no reasonable man would try it. Or, put more simply, no reasonable man would say that the defendant was not enriched.'<sup>59</sup>

In respect of positive benefits, Birks originally favoured a narrow approach and argued that only those gains that have been realised (i.e. turned into money) are incontrovertibly beneficial.<sup>60</sup> Goff and Jones take a broader view and include realisable benefits.<sup>61</sup> They exclude improvements to land on the grounds that it is often not easy to realise these gains. Burrows has criticised both approaches. The narrow view encourages recipients

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<sup>58</sup> Birks, *An Introduction to the Law of Restitution* (1989), 109.

<sup>59</sup> Birks, *An Introduction to the Law of Restitution* (1989), 116.

<sup>60</sup> Birks, *An Introduction to the Law of Restitution* (1989), 121-4.

<sup>61</sup> Goff and Jones, *The Law of Restitution* (2002), para. 1-023.



to wait until after trial to realise their gain. This problem is not sufficiently met by Goff and Jones's realisable gains test since it excludes some cases where it may be easy to sell land and includes some cases where it might be burdensome for a particular recipient to realise a gain of a non-land benefit.<sup>62</sup> Burrows argues, cogently in my view, that the best approach is

‘... to take Birks’ realised test but to add that the defendant will also be regarded as incontrovertibly benefited where the court regards it as reasonably certain that he will realise the positive benefit. Assessment of the defendant’s future conduct is necessarily speculative but the courts commonly have to predict future conduct in assessing damages for loss, precisely to avoid the nonsense of rigidly cutting off loss at the date of trial.’<sup>63</sup>

#### (b) Free Acceptance

According to Birks, free acceptance ‘... occurs where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept.’<sup>64</sup> This method of overcoming subjective devaluation has proved extremely contentious. It has been rejected both by Burrows and Garner. Burrows argues that free acceptance establishes nothing more than an indifference to an object benefit conferred.<sup>65</sup> Instead, Burrows favours the ‘bargained-for’ test discussed below. Garner takes an even stronger line. He argues that the elements of the free acceptance test are very seldom present in cases where one party has rendered part performance under a contract. The important exception is where the recipient of the part

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<sup>62</sup> Burrows, *The Law of Restitution* (2002), 19.

<sup>63</sup> *Ibid.* Birks now appears to have been persuaded by Burrows’ argument. See Birks, *Unjust Enrichment* (2003), 50.

<sup>64</sup> Birks, *An Introduction to the Law of Restitution* (1989), 265.

<sup>65</sup> Burrows, *The Law of Restitution* (2002), 21. See also Burrows, ‘Free Acceptance and the Law of Restitution’ (1988) 104 *LQR* 576.

performance uses that performance as the basis to complete the work.<sup>66</sup>

Birks himself has stated that part performance under a contract will not constitute a free acceptance. In response, Birks developed the concept of 'limited acceptance' to resolve this problem. In Birks' words,

'[t]he idea behind that label was that there is in these cases a sufficient acceptance of the part performance to bar recourse to subjective devaluation even though it would be difficult to say that there was an acceptance from which you could spell out an unjust factor.'<sup>67</sup>

Birks explains further that 'limited acceptance' may be the appropriate test for enrichment when resort to subjective devaluation appears unconscionable as a result of his own conduct in respect of the benefit received.<sup>68</sup> A clear example of this is where the recipient uses the part performance as a basis to complete the work.

### (c) Bargained-for Benefits

In preference to the free acceptance test, Burrows has suggested the 'bargained-for' test to overcome subjective devaluation. The essence of the idea is that where a party has entered the market and requested a service, then

'... it can be rebuttably presumed that it [the recipient] regards itself as benefited by what it has received and that it has been saved part of the expense that it would otherwise have incurred.'<sup>69</sup>

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<sup>66</sup> Garner, 'The Role of Subjective Benefit in the Law of Unjustified Enrichment' (1990) 10 *OJLS* 42 at 54.

<sup>67</sup> Birks, 'In Defence of Free Acceptance' in *Essays on the Law of Restitution* (1991), 105 at 139.

<sup>68</sup> Birks, *An Introduction to the Law of Restitution* (1989), 232. See also Birks, 'In Defence of Free Acceptance' in *Essays on the Law of Restitution* (1991), 105 at 140 where he states that even in the absence of such conduct, it may sometimes be unconscionable for the recipient of a benefit to rely on subjective devaluation. The example given is the receipt of three quarters of a house that was contracted for.

<sup>69</sup> Burrows, *The Law of Restitution* (2002), 23. This is similar, although not identical, to Barker's 'satisfaction' test of enrichment. See Barker, (2001) 54 *CLP* at 265.

This test is unproblematic where the recipient has received precisely what he bargained for under the contract. Where, however, the recipient has received a defective performance or only part of the contracted for performance, Garner has argued that Burrows' rebuttable presumption is based on a 'fallacious jump in reasoning'.<sup>70</sup> This is because the recipient has bargained for complete performance. According to Garner's approach, the mere receipt of a part performance without more does not result in a subjective benefit. The presumption must be one of 'no benefit'.

In response to this criticism, Burrows argues that Garner's point amounts to no more than a claim that the presumption of benefit created by the 'bargained-for' test can sometimes be rebutted. This would occur, for example, where the cost of completing the performance would be as much as the original contract price.<sup>71</sup> As Skelton has pointed out, although Garner and Burrows start with different presumptions, the fact that both admit exceptions means that they meet in the middle ground.<sup>72</sup> The same point can be made about the difference between Burrows' bargained-for test and Birks' limited acceptance test.

#### (iv) *Analysis*

It is submitted that the different tests used to overcome subjective devaluation are particularly helpful in uncovering the principles underlying the imposition of liability for restitution after termination for breach. Put another way, the various tests of enrichment explain why restitution should be allowed or disallowed in different contexts. It is important to bear in mind that we are not at this stage concerned with the

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<sup>70</sup> Garner, (1990) 10 *OJLS* 53 n54.

<sup>71</sup> Burrows, *The Law of Restitution* (2002), 24.

<sup>72</sup> Skelton, *Restitution and Contract* (1998), 19.

*extent* of liability for restitution but with the antecedent question whether the recipient of a benefit should be liable for restitution *to some extent*.

It has been emphasised in this chapter that it is necessary to distinguish between two situations in which the claim for restitution arises. First is the case where a performance leaves the recipient with an end product. It is necessary here to make a further distinction between those cases where the breach results in defective performance and those cases where the breach does not relate to that performance. The latter might occur, for example, if a property developer runs out of money and, as a result, has to repudiate a construction contract. In this example, Burrows' 'bargained-for' test provides the proper explanation for the aggrieved party's restitution claim.<sup>73</sup> The former will most commonly occur where a contractor delivers a defective performance. This is unproblematic where the employer uses this defective performance as a basis to complete the work. Although there are problems at the edges of free acceptance, Birks' limited acceptance explains the decisions in Scots and South African law in which the courts have held that utilisation triggers a restitution claim.

The case where the employer terminates the contract and does not utilise the defective performance is more complex. Clearly limited acceptance is excluded. Burrows' bargained-for test is also inappropriate because the employer can legitimately say that he has no desire, for example, for an outhouse made from wood when he contracted for brick to be used. In these circumstances the presumption of enrichment is rebutted.

Assuming that the benefit increases the value of the land, then these cases must be resolved with the incontrovertible benefit test. A court will need to ascertain whether

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<sup>73</sup> Although the incontrovertible benefit test might also apply, this is not necessarily true. For example, the construction of a moat around a house might actually decrease the value of the land.

it is reasonably certain that the recipient will realise the value of the benefit. This approach will grant the courts the requisite flexibility to achieve the right balance between preventing the imposition of liability where it is unlikely that recipient will realise the gain and ensuring that cunning recipients are prevented from being left with a windfall gain.

The second case is where the performance does not result in an end product. Where the breach is unrelated to the performance, then the bargained-for test applies in the same way as described above.<sup>74</sup> The acute case is where the breach is caused by a defective performance. It is necessary to make a further distinction between those cases where the performance results in saved expenditure and those cases where the performance cannot be measured in money. Examples of the former are washing a car, washing windows or removing the waste paper from a solicitor's office. Examples of the latter are attending a piano recital or watching a film.

Where the performance has a monetary value, then the 'bargained-for' test explains why liability for restitution arises. A clear example in Scots law is *Graham v United Turkey Red*.<sup>75</sup> In this case, an agent, in breach of contract, acted for the principal's competitor.<sup>76</sup> After the contract was terminated, the agent ought to have had a claim for restitution against the employer for the work carried out prior to termination.<sup>77</sup> Although he did not receive precisely what he contracted for – an agent acting exclusively on his behalf – he did, nevertheless, bargain for an agent to carry out work on his behalf. The point is that the 'bargained-for' test indicates why it would be unjust

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<sup>74</sup> This explains cases such as *Spenser v Gostelow* where an employee can claim restitution for work done in accordance with the contract prior to termination for breach. See section 6.3.1(ii)(b).

<sup>75</sup> 1922 SC 533.

<sup>76</sup> For a discussion of this case in the context of accrued rights see section 3.3.2(i).

<sup>77</sup> Although it has been held that the agent in breach could not claim on the contract, there was some *obiter* suggestion that he might have an unjustified enrichment claim against the principal. See *Graham v United Turkey Red* 1922 SC 533 at 550.

to allow the principal in this case to say that he did not value that performance *at all*. Accordingly, the enquiry in this case should focus on the extent to which the principal has benefited from the agent's work. This is a matter of quantum.

Where the performance cannot be measured in money, the tricky case is where the breach relates to the defective performance. This might occur for example, if a concert pianist suffers an irretrievable memory lapse half way through Bach's Goldberg variations and, as a result, fails to complete the concert or if a cinema's film projector burns the cinema's only copy of a movie midway through the film. In my view, none of the tests designed to overcome subjective devaluation will result in the imposition of liability for restitution. This is because the aggrieved party can always legitimately claim that their satisfaction is only triggered on hearing the complete performance or on seeing the whole film. Although the aggrieved party will have received an objective benefit in these cases, they can always subjectively devalue this part performance to defeat a restitution claim. The nature of the performance contracted for justifies this result.

#### 6.3.4 Conclusion

The focus in this section has been on the appropriate trigger for a restitution claim in respect of an inherently non-returnable benefit. It was argued that the principles which determine when this claim is appropriate are helpfully articulated by the tests developed in English law to determine when a party is enriched. All that is required at this stage of the analysis is a conclusion that a recipient of performance has benefited from that performance to some extent. The important question about the extent of the recipient's liability is considered in the following section.

## 6.4 Quantum of a Restitution Claim

When the right to restitution arises, the next question concerns its quantum. Herein lies the heartland of the argument about the proper doctrinal basis of restitution of non-returnable benefits.

Once again, it is helpful to distinguish between those cases where a performance leaves the recipient with an end product and those cases where the performance does not yield an end product. It is also helpful to deal separately with cases where the performance is defective and cases where the performance (although not complete) accords with the contract. In certain instances it is also necessary to deal separately with the contract breaker's restitution claim and the aggrieved party's restitution claim. This can impact on the relative moral blameworthiness of the parties and, as a result, can have a bearing on the extent to which each party ought to be made liable for restitution.

As we shall see below, many of the difficulties that arise relate to the role of the contract price in determining the quantum of restitution.

### 6.4.1 Contract Breaker's Claim for Restitution of a Performance Resulting in a Defective End Product

Restitution claims for defective performances which yield an end product arise most commonly where a contractor has delivered defective building work.<sup>78</sup> The following example illustrates the issues at stake. Assume that a builder breaches a

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<sup>78</sup> As pointed out in sections 6.3.1(ii)(a) and 6.3.2(ii), there is little case law directly in point in either South African or Scots law. Many cases that could have been resolved by restitution claims have instead been resolved with the *exceptio non adimpleti contractus* or the right of retention.

contract after having completed only 30 percent of the work. What is the appropriate quantum of the contract breaker's restitution claim in these circumstances?

In the majority of cases, the aggrieved developer will get another contractor to complete the work. It is critical that the aggrieved party can set off his damages claim against the contract breaker's restitution claim. Accordingly, if the aggrieved party has to spend more than the original contract price to complete the work, the original contractor will not receive anything from a restitution claim.<sup>79</sup> In fact, he will be liable to make up the difference between the total amount spent and the original contract price. This might occur because it is costly to rectify the original contractor's defects or because the original contractor entered into a losing contract.

If the cost of completing the work is less than the contract price, the maximum the original contractor will receive is the difference between the original contract price and the amount paid to the second contractor. If the sum of the amount paid to the second contractor and the quantum of restitution (on all methods of calculation) is greater than the original contract price, then the contract breaker will only receive the difference between the total contract price and the amount paid to the second contractor. The availability of the aggrieved party's damages claim means that his maximum exposure is the total contract price. This is the right result in principle.

The method of calculating the contract breaker's restitution claim will only affect the quantum recoverable in cases where (a) this method causes the sum of the quantum of restitution and the amount paid to the second contractor to exceed the original contract price (in circumstances where other methods would not have this effect) and in cases where (b) the sum of the quantum of restitution and the amount

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<sup>79</sup> This assumes that the original contractor has not been paid for the work carried out.



paid to the second contractor is less than the original contract price. The latter will occur when the contract breaker has entered into a winning contract.

One argument used to justify the enrichment nature of the contract breaker's restitution claim is that any reference to the contract price will unjustifiably include an element of the contract breaker's profit.<sup>80</sup> It should not be overlooked, however, that if the enrichment is calculated by ascertaining the cost of similar services in the market, this will also include a profit element.

There are three measures that can be used to quantify the contract breaker's restitution claim. First, the contract breaker's restitution claim can be calculated as a percentage of the contract price which equates to that relationship that the work actually carried out bears to the work required for complete performance (i.e. by the pro rata contract price). Secondly, restitution can be calculated by ascertaining what a similar contractor would have charged to do the work carried out (i.e. the market value of services rendered) and thirdly, restitution can be calculated as the increase in the value of the aggrieved party's property.

In a winning contract, the pro rata contract price will in all probability yield a better result for the contract breaker than a measure which focuses on the increase in the value of the land or on the market value of the services rendered. As the contract breaker is more morally blameworthy than the aggrieved party for the breach, it seems justified to use the measure which is more advantageous to the aggrieved party. Accordingly, it is arguably correct that the contract breaker's restitution claim ought to be quantified with reference to the extent of the aggrieved party's enrichment rather

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<sup>80</sup> MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (1997), 216.

than the pro rata contract price.<sup>81</sup>

For the same reason, the contract breaker's enrichment claim should be measured according to the method that yields the lower amount. Thus, if the market value of the services rendered is greater than the increase in the aggrieved party's patrimony, the latter's liability should not exceed the lower amount.<sup>82</sup>

#### 6.4.2 Aggrieved Party's Restitution Claim for a Performance Resulting in a Non-Defective (but incomplete) End Product

A typical example of a case in this category is where the aggrieved party carries out building work on his co-contractant's property. A number of tricky problems relating to the role of the contract price in determining the appropriate quantum of restitution arise here. In order to unpack these problems, it is necessary to answer five questions. First, should the aggrieved party's restitution claim be restricted by his contractual expectation interest? Secondly, should the contract price stipulated for full performance operate as an upper limit on the aggrieved party's restitution claim in bad bargain cases? Thirdly, should the aggrieved party's restitution claim be limited to that portion of the contract price that the work actually carried out bears to the work required for complete performance? Fourthly, should the aggrieved party be entitled to use restitution to escape completely from a bad bargain? Fifthly, should the aggrieved party be able to claim the objective market value of his performance?

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<sup>81</sup> This is the position adopted by the Principles of European Contract Law. See PECL Art 9:309 and Lando and Beale (eds), *Principles of European Contract Law* (2000), comment on Art 9:309. This measure should be used to resolve cases such as *Steel v Young* 1907 SC 360; *Forrest v Scottish County Investment Co. Ltd* 1916 SC (HL) 28 and *P.E.C. Barr Printers Ltd v Forth Print Ltd* 1980 SLT (Sh Ct) 118.

<sup>82</sup> Englard, 'Restitution of Benefits Conferred without Obligation' in Schlechtriem (ed), *International Encyclopaedia of Comparative Law* (1991), §152. This is the position in South African law. See section 4.2.2(iii).

(i) *Should the Aggrieved Party's Restitution Claim be Limited by his Expectation Interest?*

The issue that arises here is best illustrated by a practical example. Say that a building contractor contracts with a property developer to carry out building work on a development project. The contract price is R5 million. It turns out that the market value of the work is R12 million. Assume that after the contractor had completed half the work, the developer ran out of money and, as a result, breached his winning contract. The contractor terminates the contract. The question is whether the aggrieved party's restitution claim ought to be restricted by the net loss that he would have made had the contract run its course. For the sake of argument assume that this loss is the difference between the market value of the work and the contract price i.e. R7 million.<sup>83</sup> Accordingly, the question is whether the aggrieved party's restitution claim for R6 million (assuming that half the work is worth half the value of the completed work) ought to be reduced to zero (R6 million - R7 million = -R1 million).

(a) *South African and Scots Law: A Lack of Authority*

As there is no direct authority in South African or Scots law dealing with this question, it must be approached as a matter of principle.

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<sup>83</sup> Depending on how the benefit is measured, this might in reality be a lesser amount. It is important to bear in mind that the realisable market value of the benefit is not directly related to the net loss the contractor would have incurred on the contract. Instead, the focus is on the relationship between the contract price and the contractor's cost of producing the work.

(b) The Position in Principle

In the above example, the aggrieved contractor cannot claim restitution for any of the work carried out under the contract. This will occur in all cases where the overall expectation loss exceeds the value of the benefits conferred. This has two consequences: the aggrieved party is prevented from escaping the consequences of his losing bargain and the contract breaker receives a benefit without paying anything for it. The latter seems intuitively unjust.<sup>84</sup> The arguments about restricting the aggrieved party's restitution claim by his expectation interest were considered in the context of claims for restitution of money. The conclusion reached there is that the arguments, while not watertight, favoured allowing the aggrieved party to escape the consequences of his losing contract by claiming restitution of the full purchase price.<sup>85</sup> The same arguments justify the conclusion that the aggrieved party's claim for restitution of inherently non-returnable benefits should not be restricted by his expectation interest.<sup>86</sup> Accordingly, the law should not countenance a rule which can have the effect of preventing the aggrieved party from claiming restitution and allowing the contract breaker to retain a benefit without having to pay for it.

In the context of the claim for restitution of money, the refusal to limit restitution by the expectation interest means that the aggrieved party gets full escape from the bad bargain. As money benefits cannot be valued in the same way as inherently non-returnable benefits, the same point is not true in this context. Put another way,

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<sup>84</sup> See Treitel, *Remedies for Breach of Contract* (1988), 104 who argues that it is wrong for the contract breaker to get half the work for nothing as result of his own breach.

<sup>85</sup> See section 5.3.1(iii)(c).

<sup>86</sup> Skelton, *Restitution and Contract* (1998), 63 and Burrows, *The Law of Restitution* (2002), 346. For a libertarian argument that the part performing aggrieved party should be limited to his expectancy damages see Mather, 'Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller' (1982) 92 *Yale LJ* 14.

there are a number of intermediary positions where the aggrieved party is granted some, but not complete, escape from his losing contract. The exact extent of the aggrieved party's entitlement to restitution is addressed in subsequent subsections.

(ii) *Should the Total Contract Price Cap the Aggrieved Party's Restitution Claim in Bad Bargain Cases?*

The issues raised by this question are best illustrated by *Boomer v Muir*.<sup>87</sup> In this case, the plaintiffs recovered \$258,000 by way of a *quantum meruit* claim for work done in building a dam even though they would only have been contractually entitled to another \$20,000 had the losing contract run its course. The leading authors regard this as an indefensible result.<sup>88</sup> In response, one suggestion is that the aggrieved party's restitution claim should be capped by the full contract price.

(a) *South African and Scots Law: Limited Authority*

There is no direct authority in South African law on this point. In Scots law the parties in *Thomson v Archibald* agreed to calculate a builder's restitution claim as the market value of the work done multiplied by a fraction of the total contract price over the market value of the completed work.<sup>89</sup> This was explained by Sheriff Bell on the

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<sup>87</sup> 24 P 2d 570 (1933). See also *Lodder v Slowey* [1904] AC 442 affirming (1900) 20 NZLR 321 and, most recently, *Renard Constructions ME Pty Ltd v Minister for Public Works* (1992) NSWLR 234.

<sup>88</sup> See for example Visser, (1992) *AJ* 203 at 229; Goff and Jones, *The Law of Restitution* (2002), paras 20-021 to 20-022 and Burrows, *The Law of Restitution* (2002), 346-7. According to England, most legal systems are not prepared to award restitution completely divorced from the contract price. For a comparative overview see England, 'Restitution of Benefits Conferred without Obligation' in *International Encyclopaedia of Comparative Law* (1991), §141-2. For an argument as to why *Boomer v Muir* creates economic inefficiencies see Kull, 'Restitution as a Remedy for Breach of Contract' (1994) 67 *S Cal LR* 1465 at 1472.

<sup>89</sup> *Thomson v Archibald* 1990 GWD 26-1438 at 17-18 (Transcript).

basis that the recipient of a benefit should not be liable for more than a proportionate part of the price he agreed to pay.<sup>90</sup> The key point is that if the relationship between the value of the work actually carried out and the value of the total work represents the relationship between the proportion that the work actually carried out bears to the complete work, restitution will never exceed the contract price.<sup>91</sup> The authority is limited, however, as the method of calculating the claim was not in issue before the court and it is clear the judge regarded it sceptically. Furthermore, the case involved a claim by a contract breaker.

#### (b) Justifications and Criticisms of the Total Contract Price Restriction

Limiting restitution to the total contract price is favoured by Goff and Jones and by Visser as the most appropriate way of preventing the aggrieved party claiming an amount in excess of the contract price.<sup>92</sup>

Goff and Jones defend this argument on the basis that it protects both parties' contractual expectations.<sup>93</sup> The contract breaker's expectations are respected because the total contract price is the maximum exposure to which he consented. The aggrieved party's expectations are respected because the total contract price is the maximum amount he would have anticipated receiving from the contract breaker.<sup>94</sup>

Restricting restitution claims to the total contract price has been criticised on

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<sup>90</sup> *Ibid.*

<sup>91</sup> MacQueen, (1994) *AJ* 137 at 163.

<sup>92</sup> Goff and Jones, *The Law of Restitution* (2002), para. 20-021 to 20-022 and Visser, (1992) *AJ* 229. Birks originally favoured this position but has subsequently changed his view. See respectively, Birks, *An Introduction to the Law of Restitution* (1989), 288 and Birks, 'In Defence of Free Acceptance' in *Essays on the Law of Restitution* (1991), 136.

<sup>93</sup> Goff and Jones, *The Law of Restitution* (2002), paras 20-021 to 20-022.

<sup>94</sup> Beatson, 'What Can Restitution Do for You?' in Beatson (ed), *The Use and Abuse of Unjust Enrichment* (1991), 14. For a similar argument see Kull, (1994) 67 *S Cal LR* 1478-84.

four grounds. First, Burrows argues that this restriction is inconsistent with the approach to claims for restitution of money where the aggrieved party is allowed a complete escape from a bad bargain.<sup>95</sup> Indeed, anything short of allowing the aggrieved party to claim the full cost of his performance will not allow the complete escape from the bad bargain. This will be discussed below.<sup>96</sup>

Secondly, both Burrows and Skelton raise the doctrinal argument (encountered in claims for restitution of money) that the law of unjustified enrichment, as an independent cause of action, should not be subject to restrictions which cannot be justified with reference to the internal rules of enrichment law.<sup>97</sup> The total contract price limitation is problematic because it imposes a restriction on recovery that does not focus on the extent to which the contract breaker has been enriched. This argument has already been dismissed as unconvincing.<sup>98</sup>

Thirdly, Beatson has argued that this limitation produces an indefensible arbitrary 'disequilibrium' between parties claiming restitution because the extent of the limitation depends arbitrarily on the amount of work carried out relative to the relationship between the objective market value and the contract price of the work.<sup>99</sup> For example, say that A agreed to build a 10 mile road for £10 million (£1 million per mile). It turns out that the market value of the road (and the cost to A of building this road) is £2 million per mile.<sup>100</sup> On these facts only contractors who happened to have built more than 5 miles of road would suffer a limitation to their restitution claim.

Fourthly, Treitel has argued that it is incongruous that the aggrieved party

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<sup>95</sup> Burrows, *The Law of Restitution* (2002), 346.

<sup>96</sup> See section 6.4.2(iii)(b).

<sup>97</sup> Burrows, *The Law of Restitution* (2002), 346 and Skelton, *Restitution and Contract* (1998), 68.

<sup>98</sup> See section 5.3.1(iii)(c).

<sup>99</sup> Beatson, 'What Can Restitution Do for You?' in *The Use and Abuse of Unjust Enrichment* (1991), 14-5.

<sup>100</sup> The example was originally suggested by Treitel. See Treitel, *Remedies for Breach of Contract* (1988), 104.

should get more for carrying out half the work than he would have got for carrying out all his contractual obligations.<sup>101</sup> By parity of reasoning, it could be said that it is unfair for the aggrieved party to claim the full contract price for less than complete performance.

In light of the third and fourth arguments, I agree with Beatson's conclusion that 'the contract price limit is a compromise which, while attractive on pragmatic grounds ... is not an ideal solution.'<sup>102</sup>

(iii) *Should the Pro Rata Contract Price be used to Quantify the Aggrieved Party's Restitution Claim?*

Thus far it has been established that the aggrieved party's restitution claim should not be limited by his expectation interest or by the full contract price. Another suggestion is that the aggrieved party's restitution claim ought to be limited to that percentage of the contract price which equates to that relationship that the work actually carried out bears to the work required for complete performance (i.e. by the pro rata contract price).<sup>103</sup>

(a) *South African and Scots Law: Limited Authority*

There is limited authority in South African and Scots law for the use of the pro rata contract price to measure a restitution claim. When the claim for a reduced contract

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<sup>101</sup> Treitel, *Remedies for Breach of Contract* (1988), 104. See also Goff and Jones, *The Law of Restitution* (2002), paras 20-021 to 20-022.

<sup>102</sup> Beatson, 'What Can Restitution Do for You?' in *The Use and Abuse of Unjust Enrichment* (1991), 15.

<sup>103</sup> See for example Burrows, *The Law of Restitution* (2002), 346-7; Treitel, *Remedies for Breach of Contract* (1988), 104 and Birks, 'In Defence of Free Acceptance' in *Essays on the Law of Restitution* (1991), 135-7.



price was thought to be an enrichment remedy in South African law, it was said that

‘... this question of the actual enrichment of the owner is a matter of such difficulty that justice is generally done between the parties by reference to the contract price and the portion of the work that has been left incomplete. This is not done on the understanding that the contract is still enforced, but merely to ascertain what in the estimation of the parties themselves is the relative value of the completed work and the portion still to be completed.’<sup>104</sup>

This authority is, however, limited as the contract in question had not been terminated for breach.

In Scots law, *Thomson v Archibald* provides very limited authority for restricting restitution according to the pro rata contract price.<sup>105</sup>

#### (b) Justifications and Criticisms of the Pro Rata Contract Price Restriction

In cases where the parties have entered into the bargain at the market rate there is much to be said for the view that the aggrieved party’s claim for restitution should be the pro rata contract price.

The tricky case is where the aggrieved party has entered into a bad bargain. According to Treitel, limiting restitution to the pro rata contract price is the right result as it achieves a middle ground between preventing the contract breaker from retaining a benefit without having to pay for it and preventing the aggrieved party from making a windfall gain from the contract breaker’s breach.<sup>106</sup>

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<sup>104</sup> *Van Rensburg v Straughan* 1914 AD 317 at 333. See also *Hauman v Nortje* 1914 AD 293 at 296-9.

<sup>105</sup> See section 6.4.2(ii)(a).

<sup>106</sup> Treitel, *Remedies for Breach of Contract* (1988), 104. See also Burrows, *The Law of Restitution* (2002), 344. This is also the solution adopted by the Principles of European Contract Law. See PECL Art 9:309 and Lando and Beale (eds), *Principles of European Contract Law* (2000), comment on Art 9:309.

The pro rata contract price restriction is supported on doctrinal grounds by those who argue that restitution is an enrichment action. These commentators are anxious to ensure that any check on the result in *Boomer v Muir* does not compromise the doctrinal integrity of the enrichment nature of restitution. For them, the solution lies in subjective devaluation. In Burrows' words,

'[i]f one overcomes subjective devaluation by regarding the defendant as having been benefited because he received part of what he bargained for, the pro rata contract price should form the upper limit in assessing the defendant's benefit: for to allow the claimant the objective market price in excess of this would be to re-encounter subjective devaluation in that the defendant can validly argue that it was only willing to pay at the contractual rate.'<sup>107</sup>

The idea is that the contract is not invoked *qua* contract but rather *qua* evidence of the value of the benefit to the recipient.<sup>108</sup> This is doctrinally satisfactory to the enrichment camp as the restriction is consistent with an internal rule of enrichment law.

In line with my central thesis, this doctrinal justification is not sufficient to support the argument that restitution should be restricted to the pro rata contract price.

In any event, if restitution is limited to the pro rata contract price then it looks very much like the law of contract is providing the solution to these cases. If this is true, then why not leave it to the law of contract to regulate this claim?

The question is whether this approach accurately reflects the principles of recovery underpinning restitution in these cases. Two arguments have been made against the pro rata contract price restriction. First, it has been argued that it can be

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<sup>107</sup> Burrows, *The Law of Restitution* (2002), 346.

<sup>108</sup> Birks, 'In Defence of Free Acceptance' in *Essays on the Law of Restitution* (1991), 136-7.

unfair to limit this restitution claim to the pro rata contract price if the contract price was agreed upon in exchange for full performance as this would in all likelihood have taken account of the fact that the earlier part of the work would be more expensive than the later part of the work.<sup>109</sup> In cases where the parties have entered into the contract at the market rate, the aggrieved party's damages claim takes care of this concern. When the aggrieved party has entered into a bad bargain, he will not have a damages claim and the issue becomes a live one. As a matter of policy it is right to favour the aggrieved party. Accordingly, it seems right that the aggrieved party can claim a sum greater than the strict pro rata contract price. If the contract breaker can subjectively devalue the performance according to the contract price, it will be necessary to grant the court the power to adjust the award upwards to account for the fact that the early performance is more expensive than the later performance. There is recent tangential authority in South African law supporting this discretionary approach. In the context of awarding a claim for a reduced contract price, Nienaber JA has stated that where it is not possible to quantify objectively what is required to bring the contractor's defective performance up to standard, the court has discretion to reduce the contract price by an amount required to do justice between the parties. Furthermore, the court stated that although it will sometimes be possible to prorate the defective performance with reference to the contract price in a precise way, this will not always be possible and will require the court to exercise its judgment in order to do justice between the parties.<sup>110</sup>

Secondly, it has been argued that the pro rata contract price restriction does not take into account the reasons that the aggrieved party might have agreed

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<sup>109</sup> This is because of the contractor's fixed costs and economies of scale. See Beatson, 'What Can Restitution Do for You?' in Beatson (ed), *The Use and Abuse of Unjust Enrichment* (1991), 14 and Skelton, *Restitution and Contract* (1998), 66.

<sup>110</sup> *Thomson v Scholtz* 1999 (1) SA 232 (SCA) at 248-50.

to a losing bargain. For example, a new contractor might agree to a losing bargain in order to gain market exposure or to procure future work from a large client.<sup>111</sup> Although contract law is not usually concerned with parties' motives for contracting, it is arguable that restricting the aggrieved party's restitution claim strictly according to the pro rata contract price (or the total contract price for that matter) is unfair when the contract breaker knew or ought reasonably to have known the reasons that the contractor agreed to the losing bargain.<sup>112</sup> In Gordon and Frankel's words:

'[i]f the other party [the contract breaker] had agreed to receive the discount price and had notice of the supplier's [the aggrieved party] expectations, that party should be permitted to take advantage of the discount without meeting the expectation if and only if the party performs its part of the bargain. If that party breaches the contract, the discount – which was premised upon the promise of contract completion – should no longer be available to it.'<sup>113</sup>

Accordingly, it does seem unjust to restrict the aggrieved party's restitution claim with reference to the contract price when this price is closely connected to the contract running its course. In these cases, it seems right to allow the aggrieved party to unhinge himself, at least to some extent, from the fetters of the original contract price.

Gordon and Frankel make a convincing economic case for supporting this position. They argue that contracts containing such discounts may be value-maximising and are more likely to take place if the contractor knows that he will

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<sup>111</sup> Skelton, *Restitution and Contract* (1998), 67.

<sup>112</sup> Where this is not the case, it seems right to allow the contract breaker to subjectively devalue the performance. It follows that it would be wrong to award the aggrieved party a restitution claim with reference to the objective market value in these cases.

<sup>113</sup> Gordon and Frankel, 'Enforcing Coasian Bribes for Non-Price Benefits: A New Role for Restitution' (1994) *S Cal LR* 1519 at 1570.

recover the discount if the contract does not run its course.<sup>114</sup> They also claim that this solution provides incentives for newcomers to enter new markets.<sup>115</sup>

In essence, the argument is that it is sometimes right to protect the aggrieved party's non-price expectations. The question now is how should these expectations be protected or, put another way, how much can the aggrieved party claim in these cases. This is not easily resolved. If the aim is to protect these non-price expectations, then it is right that the focus should be on the aggrieved party's loss rather than on the contract breaker's gain.<sup>116</sup> This loss is not easy to quantify and will of course involve some speculation by the court. Justice will probably be done by adopting Gordon and Frankel's suggestion that the aggrieved party should be entitled to the lesser of the cost of performance and the market value of that performance.<sup>117</sup> Unless the contractor is incompetent, it is likely that the cost of his performance will be less than the market value of that performance. It is right that the market value measure should serve to protect the contract breaker from the contractor's incompetence.

In all cases where the aggrieved party is awarded the cost of his performance he will escape from the bad bargain. If his cost of performance is greater than the market value of this performance, it is justified that he is not granted complete escape from the losing contract. This will ensure that in respect of escaping from bad bargains, claims for restitution of money and returnable benefits and claims for restitution of inherently non-returnable benefits are only different where this is justified.

The next question is whether the law of contract or the law of unjustified enrichment is best placed to achieve this result. The problem with the law of enrichment

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<sup>114</sup> Gordon and Frankel, (1994) *S Cal LR* 1542-9.

<sup>115</sup> Gordon and Frankel, (1994) *S Cal LR* 1544.

<sup>116</sup> Gordon and Frankel, (1994) *S Cal LR* 1552.

<sup>117</sup> Gordon and Frankel, (1994) *S Cal LR* 1551-2.

is that it suffers from a fundamental perspective limitation: it can only view matters in this regard from the recipient's perspective. In order to overcome this limitation Skelton argues that the recipient's enrichment must be measured subjectively and that in order to assess the true subjective value of the benefit to the contract breaker, it is necessary to

‘... take into account not just the terms of the contract relating to the contract price, but all the other terms of the contract (express or implied) and the facts known or perceived by the defaulting party whilst he was engaged in the bargaining process.’<sup>118</sup>

With respect, this is not convincing. No matter how one chooses to value enrichment, the question remains the same: to what extent has the *recipient* been enriched at the other party's expense? From a doctrinal point of view there is no room for focussing, as Skelton does, on the reasons why the aggrieved party accepted a contract price lower than the market rate or on the extent of his loss.<sup>119</sup> Accordingly, the fact that the developer knew that the aggrieved contractor was entering into a losing contract does not reveal very much about the subjective value that the contract breaker places on the contractor's performance.<sup>120</sup>

The upshot is that unjustified enrichment will only achieve the right result in cases where the cost of performance exceeds the market value of the performance. If the aggrieved party's restitution claim is always quantified by calculating the increase in the value of the developer's estate, this will leave it to chance whether the right result

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<sup>118</sup> Skelton, *Restitution and Contract* (1998), 78.

<sup>119</sup> Miller, ‘Review of Skelton, A. *Restitution and Contract*’ (2001) 5 *Edin LR* 106 at 107.

<sup>120</sup> In any event, it might well be difficult for the aggrieved contractor to overturn the developer's claim that he was only prepared to undertake the development if he found a similarly good bargain. This demonstrates that it is probably difficult to prevent the developer from subjectively devaluing his enrichment according to the terms of the contract. If this is true, it appears that the law of contract is providing the solution to these cases.

will be achieved.

The only enrichment measure which is useful here is the saving made by the contract breaker. This will invariably be calculated by looking at the cost of attaining similar services in the market place and serves as the protection mechanism against contractors whose cost of performance exceeds the market value of that performance.

As unjustified enrichment will only achieve the right result in all but a small number of these cases, it is suggested that the courts should be left to develop a contractual rule designed to achieve the right result.

This indicates that the law of contract is, or can be adapted to be, more sensitive to the principles of recovery underlying the restitution claims under review than the law of unjustified enrichment. This is because contract law is constituted by a broader and more complex set of normative principles than the law of unjustified enrichment.

#### 6.4.3 Restitution Claims for Performances that do not Result in End Products

This claim for restitution will occur in all cases where a contractant has rendered a service to the other party. Once the right to restitution has been established, these restitution claims raise similar quantification problems to restitution claims that yield an end product. The following analysis highlights additional points.

##### (i) *Contract Breaker's Claim*

It was stated in section 5.3.1(ii)(a) and (c) that the aggrieved party is under a

corresponding duty to make counter-restitution when claiming restitution of the purchase price. The South African courts have a discretionary power to reduce the aggrieved party's claim for restitution of money if that party made use of the defective performance.<sup>121</sup> Although the courts have yet to exercise this discretion, it is clear that there is no hard and fast way of determining the appropriate level of compensation. For example, how should the court decide the extent of a holidaymaker's liability when the contract provided for a scuba diving holiday and the holidaymaker, in absence of these facilities, decided to make the best of it and learn tennis at the same resort? In my view, it is necessary to grant the court flexibility to do justice between the parties in these cases.

It is suggested that in the absence of equivalent case law, Scots law should follow the South African law in allowing the courts a similar discretion.

Similar issues arise in cases where the aggrieved purchaser uses a defective car prior to termination for breach. Originally, the South African courts stated that the court could modify the amount that the seller had to repay to the purchaser.<sup>122</sup> Recently, the courts have said that justice will be done if the aggrieved purchaser's use of the car is set off against the seller's use of the purchase price and that a 'meticulous readjustment' of the economic interest between the parties was not necessary.<sup>123</sup> In all likelihood, the expense saved by the aggrieved party by having the use of the car will be greater than the interest earned on the purchase price. This reflects the policy of favouring the aggrieved party when winding up a contract after termination for breach. However, in this instance it can be argued that it is unfair to the contract breaker and there is a case

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<sup>121</sup> *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W) and *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W).

<sup>122</sup> *Alpha Trust v Van der Watt* 1975 (3) SA 734 (A) at 749.

<sup>123</sup> *Katzeff v City Car Sales* 1998 (2) SA 644 (C) at 654.



for granting the courts the flexibility to modify the award in appropriate cases to do justice between the parties. In this regard, South African law would do well to follow the flexible approach in Scots law where the buyer's right to reclaim the purchase price can be reduced in order to take into account any use of that has been made of the goods.<sup>124</sup>

When the contract breaker's breach is unrelated to the content of the performance, then it is right to award restitution according to the pro rata contract price.<sup>125</sup>

(ii) *Aggrieved Party's Claim*

In line with the approach to restitution of inherently non-returnable benefits yielding an end product, the aggrieved party's restitution claim for restitution in this context should not be limited by his expectation interest or by the full contract price and only sometimes by the pro rata contract price. The approach advocated above should apply equally in this context.

## **6.5 Doctrinal Basis of Restitution of Inherently Non-Returnable Benefits: A Summary**

The existing law in Scotland and South Africa is that restitution of non-returnable benefits is an enrichment action. There is no doubt that enrichment concepts play an important and useful role in determining when the right to claim restitution of

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<sup>124</sup> This only applies to the termination of a contract under the new Pt 5A of the Sale of Goods Act 1979 (as amended). See section 48C. This section was added by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045). For a discussion of these new provisions see Hogg, 2003 *SLT (News)*, 277.

<sup>125</sup> This would occur in a case such as *Spenser v Gostelow* 1920 AD 617. See section 3.2.1(ii).

inherently non-returnable benefits arises. In this regard, helpful work has been done in English law on the notion of benefit. It does not follow, however, that restitution must necessarily be an enrichment action. In the context of a claim for a reduced contract price, the South African courts have stated that this claim is triggered by utilisation and that it is a contractual remedy.<sup>126</sup> As there is an overlap between the tests used to trigger a restitution claim and the test used to trigger a claim for the reduced contract price, it is clear that contract law can accommodate the analysis of what constitutes a benefit.<sup>127</sup>

In respect of the quantum of restitution, it is necessary to distinguish between the contract breaker's restitution claim and the aggrieved party's restitution claim.

When the contract breaker is claiming restitution, it is critical to bear in mind that the aggrieved party has a damages claim against the contract breaker. If the aggrieved party has to spend more than the original contract price to complete the work, then the original contractor will not receive anything by way of a restitution claim. In fact, he will be liable to make up the difference between the total amount spent and the original contract price.

If the cost of completing the work is less than the contract price, the maximum the original contractor will receive is the difference between the original contract price and the amount paid to the second contractor.

The method of calculating the contract breaker's restitution claim will only affect the quantum recoverable in cases where (a) this method causes the sum of the quantum of restitution and the amount paid to the second contractor to exceed the

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<sup>126</sup> *BK Tooling (Edms) Bpk v Scope Precision Engineering* 1979 (1) SA 391 (A) and *Thomson v Scholtz* 1999 (1) SA 232 (SCA).

<sup>127</sup> This is in line with MacQueen's suggestion – outlined in section 4.4.3(iv)(b) – that a contractual view of restitution does not necessarily mean that enrichment concepts are irrelevant. His approach calls on the courts to look to enrichment considerations in appropriate circumstances without necessarily importing wholesale enrichment analysis.

original contract price and in cases where (b) the sum of quantum of restitution and the amount paid to the second contractor is less than the original contract price. The latter will occur when the contract breaker has entered into a winning contract.

In a winning contract, it was argued that the contract breaker's restitution claim should be quantified by calculating the extent of the aggrieved party's enrichment. This should be the lesser of the increase in the aggrieved party's patrimony and the cost of procuring similar work in the market place (i.e. the market value of the services).

I argued that the aggrieved party's restitution claim should not be restricted by his expectation interest or by the total contract price and only sometimes by the pro rata contract price. In cases where the aggrieved party has not articulated the reasons for entering into the losing contract and the contract breaker should not have reasonably known these reasons, it seems right to measure the aggrieved party's restitution claim with reference to the pro rata contract price making the adjustment, when necessary, for the fact that early performance can be more expensive than the later performance. This result will not be achieved if the aggrieved party is entitled to a restitution claim measured with reference to the objective market value of his performance. Accordingly, it looks very much as though the law of contract is actually providing the solution to these cases. This solution achieves the right balance between ensuring that the contract breaker does not get a benefit without having to pay for it and ensuring that the aggrieved party does not gain a windfall benefit as a result of the contract breaker's breach.

In cases where these reasons are articulated or ought reasonably to have been known, it seems right to allow the aggrieved party to claim more than the pro rata contract price. The right balance in these cases is probably achieved by granting the aggrieved party a restitution claim for the lesser of the cost of his

performance and the market value of that performance. It was argued that as unjustified enrichment can only achieve the right result in a small number of cases, it should be left to the courts to develop a contractual rule to achieve the right result.

## Chapter 7

### **The Claim to Redress Economic Imbalances after Termination for Supervening Impossibility of Performance/Frustration and *Restitutio in Integrum* after Termination of a Contract that is Voidable by Reason of Improperly Obtained Consent**

#### **7.1 Introduction**

The aim of this chapter is to consider the analytical implications of the doctrinal arguments made about restitution after termination for breach for the claim to redress the economic imbalances after supervening impossibility of performance/frustration and for *restitutio in integrum* after termination of a contract that is voidable by reason of improperly obtained consent. The point of connection between the three species of contractual failure is that they all involve contracts which were initially valid but have subsequently been terminated. One significant difference between contracts terminated for supervening impossibility/frustration and the other two species of contractual failure is the incidence of fault in the circumstances leading to the contractual failure. It will be demonstrated that this difference has an important role to play in distilling the principles of recovery underpinning the claims under review in this chapter. In terms of the approach advocated in this thesis, this, in turn, informs the question about the proper doctrinal basis of these claims.

#### **7.2 The Claim to Redress Economic Imbalances after Termination for Supervening Impossibility of Performance/Frustration**

Although South African law calls their doctrine ‘supervening impossibility’ and Scots law calls its equivalent doctrine ‘frustration’, this is nothing more than a semantic

difference.<sup>1</sup> Both terms will be used interchangeably.

Frustration describes the failure of a contractual relationship where it has become objectively impossible for one or both contracting parties to perform a contractual obligation. There are numerous reasons, often listed under the general categories of *vis major* and *casus fortuitus*, which cause an obligation to be discharged by supervening impossibility/frustration. Examples include lightning, earthquakes, unprecedented floods, acts of state legislature and the outbreak of war.<sup>2</sup>

As the focus in this chapter is on the consequences of frustration, it will be assumed throughout that the circumstances exist which trigger the valid operation of the doctrine. The aim of this chapter is not to attempt a comprehensive study of the consequences of frustration but rather to focus on the following two narrower questions. First, is the law of unjustified enrichment the appropriate doctrinal basis to regulate the consequences of frustration and secondly, if the answer to the first question is in the negative, which principles ought to guide the law in regulating these consequences?

### 7.2.1 South African Law: Current Law and Academic Views

In respect of redressing the economic imbalances in frustration cases, South

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<sup>1</sup> The precise effect that frustration has on the contractual nexus between the parties ought to be equivalent to the effect that termination for breach has on this nexus. The effect of frustration on the contractual nexus does not, unlike cases of termination for breach, need to accommodate contractual damages. Although there are no cases in Scots law or South African law dealing with the survival of accrued rights in frustration cases, there is no reason why the same rules described in chapter three should not apply here. Cf *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at 201 where the court says that supervening impossibility of performance extinguishes the contractual nexus between the parties. This is understandable as the current South African law states that each party's liability is limited to the extent of their enrichment. For a discussion of the Scottish authorities see Evans-Jones, *Unjustified Enrichment* (2003), paras 4.53-5.

<sup>2</sup> See generally Hutchison *et al.*, *Wille's Principles of South African Law* (1991), 498-9 and Gloag and Henderson, *Law of Scotland* (2001), para. 13.16.

African law limits each party's liability to the extent of their unjustified enrichment.

Until recently, this view rested on some old authority and De Vos's view that where the performance received is either a specific thing or money, then the action to recover this performance is the *condictio sine causa* in the form of the *condictio ob causam finitam* and where the performance takes the place of a factum, an ad hoc enrichment action is said to lie.<sup>3</sup> Building on De Vos's work, Ramsden has argued that there is historical support for using the *condictiones* in this context in South African law.<sup>4</sup>

This enrichment nature of the claim to redress the economic imbalances in these cases has now been confirmed by the Supreme Court of Appeal in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*.<sup>5</sup> In referring to the choice between the *condictio ob causam finitam* and the *condictio causa data causa non secuta* and specifically to Evans-Jones' argument about the latter, Navsa JA and Hefer AJA stated that

'[t]he essential point is that ... [the] claim is covered by one or the other remedy for unjust enrichment. It follows that to assess that claim one has to consider whether the following general enrichment elements are present.'<sup>6</sup>

This reiterates the argument, articulated in the context of termination for breach, that the historical development of a particular enrichment action or the precise identity of the enrichment remedy should not be used as a threshold criterion for choosing between defensible doctrinal alternatives.<sup>7</sup>

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<sup>3</sup> For the old authorities see *Wiley NO v Mundinch and Co.* (1902) 19 SC 447 at 452; *Holtshausen v Minaar* (1905) 10 HCG 50 and *Hughes v Levy* 1907 TS 276. For De Vos's view see De Vos, *Verykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987), 159. The majority of authors in South African law follow De Vos' view. See, for example, Lubbe and Murray, *Farlam and Hathaway-Contract: Cases, Materials and Commentary* (1988), 769-70.

<sup>4</sup> Ramsden, 'Some Historical Aspects of Supervening Impossibility of Performance of Contract' (1975) 38 THRHR 153, 284 and 370. See also Buckland, 'Casus and Frustration in Roman Law' (1933) 46 HLR 1281 at 1281-300.

<sup>5</sup> 2003 (5) SA 193 (SCA).

<sup>6</sup> *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at 202.

<sup>7</sup> See section 4.4.4(ii)(d).

Given the twin facts that Visser and Hutton consider restitution after termination for breach to be enrichment-based and that they desire doctrinal symmetry in regulating the consequences of contractual failure, it is unsurprising to find that both support the prevailing position in South African law.<sup>8</sup> In my view, symmetry is not by itself a sufficiently good reason for maintaining the existing law. Rather, the critical question is whether the rules and principles of unjustified enrichment law accurately reflect the principles of recovery underpinning the claim designed to redress the economic imbalances between the parties after supervening impossibility of performance. This will be explored in section 7.2.3 below.

## 7.2.2 Scots law

### (i) *Current Law*

The leading frustration case in Scots law is *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. Ltd.*<sup>9</sup> *Cantiere* relied extensively on *Watson v Shankland*.<sup>10</sup> *Watson v Shankland* concerned the recovery of a freight payment. The case was decided on the basis of the distinction between a payment of the contract price and an advance against payment of the contract price. This distinction is discussed in section 3.3.3(i) and is not directly relevant here. What is important, however, is the following dictum by Lord President Inglis:

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<sup>8</sup> Visser, 'Rethinking Unjustified Enrichment: A Perspective of the Competition between Contractual and Enrichment Remedies' (1992) *AJ* 203 at 225 and Hutton, 'Restitution after Breach of Contract: Rethinking the Conventional Jurisprudence' (1997) *AJ* 201 at 214.

<sup>9</sup> 1923 SC (HL) 105.

<sup>10</sup> (1871) 10 M 142 and (1873) 11 M (HL) 51.



‘[t]here is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this – that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration. In the Roman system demand for repayment took the form of a *condictio causa data causa non secuta* or a *condictio sine causa* or a *condictio indebiti* according to the particular circumstances. ... There seems no ground in reason or general legal principle why the rule should not apply to an advance made by a charterer to the master of a ship of a part of the stipulated freight, the consideration of the advance being the performance of the contract work of carrying and right delivery of the cargo. If the consideration on which the advance is made fails by the non-completion of the voyage, the advance is *pari ratione* repayable to the charterer.’<sup>11</sup>

This formed the doctrinal background to *Cantiere*. The facts of this case were simple. A Scottish engineering firm contracted with an Austrian shipbuilding company to build and supply the latter with marine engines. The contract stated that the first instalment of the price was payable on conclusion of the contract. After the conclusion of the contract and payment of the first instalment, the contract was frustrated as a result of the outbreak of the First World War. After the war, the purchasers claimed the return of the first instalment subject to a deduction of any incidental outlays or expenses incurred by the sellers. At first instance, Lord Hunter upheld the purchaser’s claim for the return of the purchase price subject to the deduction. Relying, *inter alia*, on the dictum in *Watson v Shankland*, Lord Hunter stated that where money is paid under a contract for a consideration which fails because the contract has become incapable of fulfilment due to the outbreak of war, a right of repetition arises under the principle *condictio causa data causa non secuta* for failure of consideration.<sup>12</sup>

Although Lord Hunter’s decision was overturned by the First Division, it was reinstated by the House of Lords and represents the existing law in Scotland.

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<sup>11</sup> *Watson v Shankland* (1871) 10 M 142 at 152-3.

<sup>12</sup> *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. Ltd* 1923 SC (HL) 105 at 112.

The upshot is that the claim for the recovery of a performance rendered under a frustrated contract is the enrichment-based *condictio causa data causa non secuta*. The *causa* is *non secuta* because the claimant has not received the anticipated contractual reciprocation.

(ii) *Academic Views*

Despite the clear judicial pronouncement that restitution after frustration in Scots law is an enrichment remedy, the academic commentators have remained sceptical. *Cantiere* has been subjected to three separate strands of criticism.

First, it has been argued that the judges misunderstood the use of the *condictio causa data causa non secuta* in Roman law, the *ius commune*, the Scottish institutional writers and *Watson v Shankland*, with the result that the remedy was incorrectly applied in a contractual context. This argument focuses on the scope of the *condictio causa data causa non secuta*. The main claim is that it is doctrinally inappropriate and historically inaccurate to use this *condictio* in a contractual context.<sup>13</sup>

Evans-Jones and MacCormack have argued that the House of Lords extended the scope of the *condictio causa data causa non secuta* beyond the ambit envisaged by Lord President Inglis in *Watson v Shankland*.<sup>14</sup> The argument here is that *Watson v Shankland* did not apply the *condictio causa data causa non secuta* directly in a contractual context in the sense that the *condictio* was applicable where the reciprocal counter-performance had not been received (failure of consideration).<sup>15</sup> It is clear, however, that the judges in *Cantiere*

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<sup>13</sup> Evans-Jones, 'The Claim to recover what was transferred for a lawful purpose outwith contract (*condictio causa data causa non secuta*)' (1997) *AJ* 139 at 157 and MacCormack, 'The *Condictio Causa Data Causa Non Secuta*' in Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995), 253 at 266.

<sup>14</sup> Evans-Jones, (1997) *AJ* 157 and MacCormack, 'The *Condictio Causa Data Causa Non Secuta*' in *The Civil Law Tradition in Scotland* (1995), 253 at 266.

<sup>15</sup> Evans-Jones, (1997) *AJ* 139 at 148-9. See also Evans-Jones, *Unjustified Enrichment* (2003), paras 4.51-2.

interpreted the *causa* for the purposes of the *condictio causa data causa non secuta* to mean failure of consideration.

According to Evans-Jones, the historical and doctrinal problem is that this interpretation does not square with the aim of making a contractual performance in the civil law tradition. In terms of this approach, a party does not perform a contractual obligation in order to receive the reciprocal counter-performance but in order to discharge a contractual obligation.<sup>16</sup> This means that *condictio causa data causa non secuta* is, by definition, inapplicable in frustration cases as the purpose of making the initial transfer is always achieved and hence always *secuta*.<sup>17</sup> This is essentially the same historical argument encountered about the scope of this *condictio* after termination for breach. The point made there applies equally here: the historical development of a particular enrichment action should not be used as a threshold criterion for deciding between defensible doctrinal alternatives.<sup>18</sup>

Secondly, it is argued that the law of unjustified enrichment is unnecessary in this context as there are already contractual rules which deal adequately with the consequences of frustration. For example, it is argued that there are contractual risk rules which determine who should bear the loss if the frustrating event damages or destroys the subject matter of the sale.<sup>19</sup> According to Evans-Jones, this demonstrates that the law of contract is sufficiently flexible to apportion 'losses depending on what is fair in light of the agreement between the parties.'<sup>20</sup> With respect, contractual risk rules

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<sup>16</sup> As stated in section 4.4.3(ii)(b), the purpose of making the contractual performance is the 'aim' and not the fact of discharging a contractual obligation.

<sup>17</sup> Evans-Jones, 'Unjust Enrichment, Contract and the Third Reception of Roman Law in Scotland' (1993) 109 *LQR* 663 at 678; Evans-Jones, (1997) *AJ* 141-3; 153 and 154 and Evans-Jones, 'Roman law in Scotland and England' (1999) 115 *LQR* 605 at 612-3.

<sup>18</sup> For a similar point see also *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at 202.

<sup>19</sup> Buckland, (1932) 46 *HLR* 1286 and Evans-Jones, (1993) 109 *LQR* 668-9.

<sup>20</sup> Evans-Jones, (1993) 109 *LQR* 679.

cannot effect loss apportionment because a risk rule operates in an all or nothing way and simply determines which *one* of the contracting parties bears the entire loss.

Thirdly, it is contended that *Cantiere* is flawed because the law of unjustified enrichment is ill-equipped to apportion losses between parties.<sup>21</sup> The problem is most keenly felt in cases where one party incurs expenses preparing to perform his side of the bargain in such a way that this expenditure does not confer a benefit on the other party.<sup>22</sup> As the law of unjustified enrichment only allows claims where one party has actually been *enriched* at another's expense, the party who incurs expenditure in preparing to perform will bear the entire loss in respect of that expenditure. In response, there is a suggestion that unjustified enrichment can effect loss apportionment through the change of position defence.<sup>23</sup> In my view, there are two reasons why this is not a principled way to apportion losses in frustration cases. First, as loss of enrichment can only be pleaded as a *defence* to an unjustified enrichment claim, it is only useful to the party who incurred losses whilst preparing to perform if he has received a contractual performance from the other party. If no contractual performance has been received by the party who incurred the loss, the other party will not institute a claim for the return of the performance (or its value). As a result, there will be nothing for the defence to latch onto. The problem is that loss apportionment will thus depend arbitrarily on whether one contracting party happens to have performed under the contract.<sup>24</sup>

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<sup>21</sup> MacQueen and Thomson, *Contract Law in Scotland* (2000), para. 4.110.

<sup>22</sup> This occurred in *Cantiere* when the engineering firm incurred expenses in preparing for their performance. See also *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL).

<sup>23</sup> McKendrick, 'Frustration, Restitution, and Loss Apportionment' in Burrows (ed), *Essays on the Law of Restitution* (1991), 147 at 151 and Stewart and Carter, 'Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal' (1992) 51CLJ 66 at 77-8.

<sup>24</sup> This problem can be illustrated with reference to the English case of *Gamerco v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226. In this case, both parties had incurred expenses in preparing to perform their side of the bargain prior to termination. When the contract was frustrated, A had paid a sum to B. In English law, section 1(2) of the Law Reform (Frustrated Contracts) Act 1943 grants the courts the power to make equitable adjustment to a claim for the return of a money payment. The problem is that the courts are only empowered to adjust for B's losses and not for A's losses. This is identical to the problem

Secondly, even where a contractual performance has been received by the party who incurred the loss, the availability of the defence does not necessarily lead to loss apportionment. Assume that B has made an advance payment of £1000 to A and that A has spent that £1000 whilst preparing to perform his side of the bargain. On these facts, A can successfully repel B's claim for the return of his advance payment by pleading change of position. This establishes that in all cases where A's wasted expenditure is equal to or less than B's advance payment, there is no loss apportionment between the parties as B bears the full cost of frustration. The only cases where there would be some loss apportionment is when A's wasted expenditure exceeds B's advance payment. This is an arbitrary way to apportion losses between the parties as the extent of loss apportionment will depend on the difference between A's wasted expenditure and B's advance payment.

This analysis establishes that the law of unjustified enrichment is indeed ill-equipped to ensure a principled form of loss apportionment in frustration cases. This is only problematic if some form of loss apportionment is desirable.

### 7.2.3 The Case for Apportioning Losses: Lessons from the Common Law

In 1943, English law enacted the Law Reform (Frustrated Contracts) Act to regulate the consequences of frustration. Although the Act can be seen as resting on the principles of unjustified enrichment, the fact that the courts are empowered to make equitable adjustments in some cases means that unjustified enrichment in its pure form

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that would be encountered if loss apportionment was left to the loss of enrichment/change of position defence. For a call for *Gamero* to be decided according to a more flexible approach based on clear principles see Barker, 'Riddles, Remedies, and Restitution: Quantifying Gain in Unjust Enrichment Law' (2001) 54 *CLP* 255 at 262-3.

is excluded.<sup>25</sup> This equitable power is limited to cases where one party has received a benefit under the contract.<sup>26</sup>

Other common law jurisdictions have seen this inability to apportion losses in *all* cases as a weakness in the Act and have chosen to enact legislative provisions which provide for loss apportionment across the board.<sup>27</sup>

Given the divergent approaches to loss apportionment in the common law, it is unsurprising to find that academic opinion on the desirability of loss apportionment is divided. Ewen McKendrick, who favours loss apportionment, argues that it is best defended on the basis that it is just and reasonable to apportion losses caused by frustration because neither party is at fault and neither party has taken the risk of the joint enterprise failing.<sup>28</sup>

Other commentators are more sceptical about accepting this as a watertight justification for loss apportionment.<sup>29</sup> In a comprehensive study of the common law, Stewart and Carter conclude that 'it is neither desirable nor feasible to adopt a scheme which seeks to apportion between the parties losses occasioned by the frustration of

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<sup>25</sup> Different views have emerged regarding the Act's theoretical foundation. On the one hand, some authors argue that the Act gives the courts a flexible discretionary power to adjust losses between the parties. See Haycroft and Waksman, 'Restitution and Frustration' (1984) *JBL* 207. Others, however, believe that the Act enacts a scheme of mutual restitution based primarily on the principles of unjustified enrichment. See, for example, Goff J in *B.P. Exploration Co. (Libya) Ltd v Hunt (No. 2)* [1979] 1 WLR 783 at 799 and Burrows and McKendrick, *Cases and Materials on the Law of Restitution* (1997), 249. Cf Lawton LJ *B.P. Exploration Co. (Libya) Ltd v Hunt (No. 2)* [1982] 1 All ER 925 at 983 and McKendrick, 'Frustration, Restitution, and Loss Apportionment' in *Essays on the Law of Restitution* (1991), 154. McKendrick argues that it is not entirely certain that the purpose behind the Act is the prevention of unjustified enrichment.

<sup>26</sup> Section 1(2) of the Law Reform (Frustrated Contracts) Act 1943.

<sup>27</sup> British Columbian Frustrated Contracts Act 1974; New South Wales Frustrated Contracts Act 1978 and South Australian Frustrated Contracts Act 1988. Although American scholars favour loss apportionment and suggest that the law is moving towards this approach, this is not yet the unequivocal position. For an overview see Englard, 'Restitution of Benefits Conferred without Obligation' in Schlechtriem (ed), *International Encyclopaedia of Comparative Law* (1991), §174-177.

<sup>28</sup> McKendrick, 'Frustration, Restitution, and Loss Apportionment' in *Essays on the Law of Restitution* (1991), 168-9. Jaffey, *The Nature and Scope of Restitution: Vitiating Transfers, Imputed Contracts and Disgorgements* (2000), 68-75 argues for loss apportionment on the basis that this is the most appropriate way to protect both parties' reliance on the contract. See also Englard, 'Restitution of Benefits Conferred without Obligation' in *International Encyclopaedia of Comparative Law* (1991), §178.

<sup>29</sup> Burrows, *The Law of Restitution* (2002), 365-6.

their contract.<sup>30</sup> Instead, they advocate liability based purely on the principles of unjustified enrichment. They defend this position on four grounds. First, they claim that the rules of unjustified enrichment can resolve the majority of cases.<sup>31</sup> This, the authors argue, is because in cases in which one party has prepared for performance and this preparation is contemplated by the parties, it is likely that such preparation will confer a benefit on the other party. When this is not the case and one party of his own accord chooses to prepare for their performance, then that party should shoulder the resulting loss.<sup>32</sup> This is not entirely convincing as there are cases where such contractually contemplated preparation does not confer a benefit on the other party. For example, it seems fair to assume that it was implicit in the contract in *Cantiere* that the parties had envisaged that the engineers would incur expenses planning for the production of the marine engines. At least some of the work correlating to these expenses (such as work carried out preparing design diagrams) probably conferred no benefit on the purchasers. Thus if an argument can be made for apportioning losses in these cases, then the rules of unjustified enrichment will not produce a just result.<sup>33</sup>

Secondly, Stewart and Carter argue that as the law of contract is largely based on individualistic ideas, contracting parties ought to be seen as pursuing their own goals and thus taking the risk of loss in incurring expenditure preparing for performances.<sup>34</sup> This does not sit comfortably with the fact that the doctrine of frustration is only triggered when neither party is responsible for the frustrating event. In my view, it

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<sup>30</sup> Stewart and Carter, (1992) 51 *CLJ* 67.

<sup>31</sup> Stewart and Carter, (1992) 51 *CLJ* 68 and 76-7.

<sup>32</sup> Stewart and Carter, (1992) 51 *CLJ* 77-8.

<sup>33</sup> As this claim does not involve restoring a performance received prior to contractual failure, it is not a claim for restitution. It is nevertheless important to consider these claims in order to evaluate the argument that unjustified enrichment is the proper basis on which to redress the economic imbalances in frustration cases.

<sup>34</sup> Stewart and Carter, (1992) 51 *CLJ* 87-8. See also Burrows, *The Law of Restitution* (2002), 365.



would be normatively preferable to ensure that the loss caused by the unforeseen frustrating event is shared between both contracting parties.

Thirdly, in attacking the justice based defence of loss apportionment, the authors say that

‘[a]bsent procedural unfairness, no accepted principle of distributive justice dictates that a bad bargain be rewritten and that the profits or losses be shared. It is hard to see why loss arising out of frustration, which is neither party’s fault, should be treated any differently.’<sup>35</sup>

This argument fails on one very important count. The idea underlying the claim in the first sentence is that bargains that have been freely entered into will be respected by the courts. This finds expression in the phrase ‘*pacta sunt servanda*’. In my view there is a material difference between this claim and the claim that the courts ought to distribute losses when a contract has been prematurely terminated as a result of neither party’s fault. The only circumstance in which their argument has currency is where it can be shown that the party incurring the expenditure would not have recovered this expenditure even if the contract had run its course. Their argument fails, however, in all cases where the party incurring the loss can show that they would have at least broken even had the contract run its course.

Finally, the authors argue that even if the law of unjustified enrichment sometimes produces unsatisfactory results in hard cases, it has the benefit of being reasonably certain and this will shield the courts from potentially lengthy and difficult litigation.<sup>36</sup> This argument overlooks the fact that it can be very complex to quantify

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<sup>35</sup> Stewart and Carter, (1992) 51 *CLJ* 88.

<sup>36</sup> Stewart and Carter, (1992) 51 *CLJ* 107-8. See also Burrows, *The Law of Restitution* (2002), 366. Burrows also argues that even if loss apportionment is appropriate, ‘it is a sensible discipline to clarify where the firm land of restitution runs out and the shifting sands of loss apportionment begin.’ Burrows, *The Law of Restitution* (2002), 366. Cf Jaffey, *The Nature and Scope of Restitution: Vitiating Transfers, Imputed Contracts and*



unjustified enrichment claims in frustration cases.<sup>37</sup> In addition, the fear that loss apportionment brings with it too much uncertainty ought to be allayed by the fact that the circumstances which give rise to termination by frustration are narrowly circumscribed and relatively rare in practice.

Furthermore, because the economic impact in these cases can be severe, flexibility at the expense of certainty can be justified on the basis that it is more important to get the few hard cases right than to have a clear rule which can cause unjust results.<sup>38</sup> This suggests that an approach in terms of which the courts are granted the power to apportion losses according to a clear set of principles is preferable to a model based exclusively on the law of unjustified enrichment.<sup>39</sup>

(i) *Principles underlying Loss Apportionment in Frustration Cases*

The question that now arises is which principles ought to guide the courts in deciding whether to apportion losses in frustration cases? First, the courts must test whether the expenditure incurred is actually wasted as a result of the supervening impossibility. The critical factor is whether the party who incurred this expenditure retains a realisable benefit as a result of such expenditure. This would occur, for example, if the engineers in *Cantiere* were left with design drawings for marine engines that could be – and were likely to be – used for subsequent orders. If this expenditure

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*Disgorgements* (2000), 75 where he says that ‘Burrows’s firm land is something of a mirage to most explorers in this area’.

<sup>37</sup> See for example the problems encountered in the complex case of *B.P. Exploration Co. (Libya) Ltd v Hunt (No. 2)* [1979] 1 WLR 783.

<sup>38</sup> Cf Burrows, *The Law of Restitution* (2002), 366.

<sup>39</sup> For a similar argument made in the context of indirect enrichment claims see Visser and Miller, ‘Between Principle and Policy: Indirect Enrichment in Subcontractor and ‘Garage-Repair’ Cases’ (2000) 117 *SALJ* 594 at 596.

was the subject of loss apportionment, then the engineers would be compensated unjustifiably for expenditure that was in fact not wasted.

However, if it turns out that such expenditure is actually wasted, then it appears intuitively correct to apportion losses between the parties. The following example will be used to tease out the principles at stake. Assume that a lessee enters into a contract with a restaurant owner in order to lease a restaurant. In advance of the lease, the restaurant owner agrees that he will make the necessary changes to convert the restaurant into a kosher restaurant. The lessee agrees to an increased rental as a result. The lessee takes over the restaurant as agreed per contract and begins to pay the increased rental. Shortly thereafter, the restaurant is destroyed by lightning. Neither party's insurance covers the losses resulting from the extra expenses incurred in order to change the restaurant. What principles are important to decide whether losses relating to the cost of changing the restaurant should be apportioned between the parties? The following proposals seem intuitively correct.

- 1) If the restaurant owner would not have benefited from the conversion had the frustrating event not occurred and the contract had run its course, then this suggests that losses should be apportioned. In our example, assuming that the restaurant owner does not want to run a kosher restaurant, then it would appear that he would not have benefited from modifying his restaurant.
- 2) If the restaurant owner would not have agreed to the conversion had he not been contracting with this lessee in particular, then the loss should be apportioned. The point here is that as the restaurant owner has incurred a loss

because he has agreed to the terms of a contract as a result of a specific request by the lessee, it appears just to apportion this loss.

- 3) If the restaurant owner would only have agreed to the conversion because he was contracting with this lessee in particular, and would not have agreed to a similar development with parties other than this lessee or someone qualitatively similar to this lessee, then the loss should be apportioned. The underlying point is that if it can be shown that in order to conclude a lease, the restaurant owner would have had to spend some money on his restaurant in any event and that this expenditure would not have resulted in a benefit to him, then these losses ought not to be apportioned. Similar considerations might apply, for example, to residential landlords who frequently have to redecorate their properties in order to attract tenants. These costs are probably best seen as part of a landlord's trade and, all things being equal, should not form part of a loss apportionment exercise.

These propositions show that there are some instances where it does seem justified to apportion losses. The example is illuminating precisely because the rules of unjustified enrichment cannot achieve this result.

#### 7.2.4 Frustration and Loss Apportionment: Theoretical Possibilities

Having established that unjustified enrichment is not the appropriate basis for the claim designed to redress the economic imbalances in frustration cases, the question that now arises is how best to incorporate a loss apportionment rule into South African and Scots law.

The House of Lords in *Cantiere* established each party's liability after frustration was limited to the extent of their unjustified enrichment.<sup>40</sup> This authority was potentially weakened because the House of Lords also approved Lord Hunter's interlocutor in the court of first instance. As stated in section 7.2.2(i), the purchaser's right to reclaim the purchase price was said to be subject to a counterclaim by the recipient for work done.<sup>41</sup> If this counterclaim is not based on unjustified enrichment, then there is a potential inconsistency between what was decided by the House of Lords and Lord Hunter's interlocutor. This is because it is theoretically possible that the counterclaim might allow for the recovery of expenses incurred which do not enrich the other contracting party.<sup>42</sup> This has led some authors to suggest that the Scottish courts have the requisite power to make equitable adjustments between the parties in frustration cases.<sup>43</sup> Lord Atkin has explicitly stated, however, that despite the House of Lords' approval of Lord Hunter's interlocutor in *Cantiere*, the Scottish courts do not have the power to apportion losses.<sup>44</sup> It is accordingly not settled whether the courts will allow such equitable adjustments to account for expenses incurred or stick instead to the tenor of the House of Lords decision in *Cantiere* and limit recovery to the extent of each party's enrichment.

In any event, the more lenient interpretation of *Cantiere* will not achieve a

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<sup>40</sup> *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. Ltd* 1923 SC (HL) 105 at 111.

<sup>41</sup> *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. Ltd* 1923 SC (HL) 105 at 112.

<sup>42</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) at 54. See also Evans-Jones, (1997) *AJ* 159-61. Unfortunately, it is not clear from Lord Hunter's interlocutor what he considered the basis of the counterclaim to be. All that is known is that he gave permission to the defendants to amend their pleas in respect of the counterclaim. See *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. Ltd* 1922 SC 723 at 728.

<sup>43</sup> Lord Cooper of Culross, 'Frustration of Contract in Scots Law' in Lord Cooper of Culross, *Selected Papers 1922-54* (1957), 124 at 128. Evans-Jones, McBryde and Hellwege also appear to favour this view of *Cantiere*. See respectively Evans-Jones, (1999) 115 *LQR* 613; McBryde, *The Law of Contract in Scotland* (2001), para. 21-48; and Hellwege, 'Unwinding Mutual Contracts: *Restitutio in Integrum* v. *The Defence of Change of Position*' in Johnston and Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 243 at 254. See also *Head Wrightson Aluminium Ltd v Aberdeen Harbour Commissioners* 1958 SLT (Notes) 12 where it was mentioned *obiter* that the party who has done work might be remunerated *quantum meruit* for such work. See also *McQuarrie v Crawford* 1951 SLT (Sh Ct) 84.

<sup>44</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) at 54.

principled form of loss apportionment. This is because Lord Hunter's interlocutor only granted the recipient of a contractual performance the right to *counterclaim* for his expenses when faced with a claim for the return of a performance received.

Accordingly, as a principled means of apportioning losses between the parties, this approach suffers from the same defects as the change of position defence.<sup>45</sup> The upshot is that neither interpretation of *Cantiere* will achieve a satisfactory loss apportionment regime. Given that *Cantiere* is so well entrenched in Scots law, it will probably be necessary to introduce a loss apportionment rule into Scots law by statute.<sup>46</sup>

As *Kudu* has recently confirmed that each party's liability after supervening impossibility is limited to the extent of their enrichment, similar legislative intervention will be required to introduce loss apportionment into South African law.

### **7.3 *Restitutio in Integrum* after Termination of a Contract that is Voidable by Reason of Improperly Obtained Consent**

In this species of contractual failure, one party's consent to contractual liability is improperly obtained. Important instances found in both South African and Scots law include duress, undue influence and misrepresentation.<sup>47</sup> It is trite law in both legal

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<sup>45</sup> See section 7.2.2(ii). See also Evans-Jones, (1999) 115 *LQR* 614.

<sup>46</sup> Evans-Jones has suggested that the principle of good faith might be used to fashion the requisite rule in contract law. Evans-Jones, (1999) 115 *LQR* 614. Were it not for the fact that *Cantiere* is so well established in Scots law, this might well be a viable alternative.

<sup>47</sup> Although Scots law does not use the term 'duress', it has an equivalent doctrine called 'force and fear'. See MacQueen and Thomson, *Contract Law in Scotland* (2000), paras 4.21-6. Despite the large overlap between the instances of improperly obtained consent in South African and Scots law, the overlap is not complete. For example, South African law does not recognise the ground of invalidity known in Scots law as 'facility and circumvention'. For an overview of the position in South African and Scots law see respectively, Van der Merwe *et al.*, *Contract: General Principles* (2003), 89-136 and McBryde, *The Law of Contract in Scotland* (2001), chapters 13-14 and 16-17. For informative historical and comparative studies on aspects of the use of unjustified enrichment after termination of a contract which is voidable by reason of improperly obtained consent see Du Plessis, *Compulsion and Restitution: A historical and comparative study of the treatment of compulsion in Scottish private law with particular emphasis on its relevance to the law of restitution or unjustified enrichment* (unpublished Ph.D. Thesis, University of Aberdeen, 1997) and Du Plessis, 'Fraud,

systems that when these voidable contracts are terminated, both parties are under a duty to restore any performances received under the contract. South African law and Scots law use the term *restitutio in integrum* to describe this process of restitution following termination of these voidable contracts.<sup>48</sup>

Although both legal systems restrict the aggrieved party's right to terminate the contract if exact restitution cannot be made, there have been sensible calls for an approach that allows restitution by financial substitute.<sup>49</sup> This will allow the courts greater flexibility to evaluate, in a more principled way, the extent to which each party ought to be liable for restitution.<sup>50</sup>

### 7.3.1 Doctrinal Basis of *Restitutio in Integrum*

#### (i) *Current Law and Academic Views*

Although there is no judicial authority in Scots law on the doctrinal basis of

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Duress and Unjustified Enrichment: A Civil Law Perspective' in Johnston and Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 194.

<sup>48</sup> It is not definitively settled in South African law whether the term *restitutio in integrum* refers merely to the process of restitution following termination of a contract which is voidable by reason of improperly obtained consent or whether it refers, in addition, to the instrument by which the contract is avoided. See Lambiris, *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989), 180-1 and 291-2; Van der Merwe *et al.*, *Contract: General Principles* (2003), 122-3 and Visser, (1992) *AJ* 203 at 211 n31. This question has not been directly addressed in Scots law. It appears from the discussions in the leading textbooks that Scots law regards *restitutio in integrum* as referring merely to restitution of performances. See Gloag, *The Law of Contract* (1929), 456 and 532-3; McBryde, *The Law of Contract in Scotland* (2001), para. 13-17 and MacQueen and Thomson, *Contract Law in Scotland* (2000), para. 4.9.

<sup>49</sup> For Scots law see *Boyd & Forrest v Glasgow & South-Western Railway Co.* 1915 SC (HL) 20. The House of Lords in *Spence v Crawford* 1939 SC (HL) 52 has stated that the requirement of *restitutio in integrum* should not be interpreted too literally. Cf MacQueen and Thomson, *Contract Law in Scotland* (2000), para. 4.9. For South African law see *Feinstein v Niggli* 1981 (2) SA 684 (A). For the argument that a more flexible approach ought to be adopted see Scottish Law Commission, *Defective Consent and Consequential Matters* (Memorandum No. 42, 1978), vol. 2 pt IV; Chen-Wishart, 'Unjust Factors and the Restitutionary Response' (2000) 20 *OJLS* 557 at 566-8 and Hogg, *Obligations* (2003), para. 4.79. See also the encouraging comments by Farlam J in *Bouygues Offshore v Owner of the MT Tigr* 1995 (A) SA 49 at 63-5 where the court was prepared to award substitutionary financial restitution for the receipt of services.

<sup>50</sup> The same point was made in respect of restitution after termination for breach. See sections 5.2.2(i)(c) and 5.3.1(ii)(c).

*restitutio in integrum*, the weight of academic opinion points to it being a contractual remedy.<sup>51</sup> In South African law, the courts have explicitly stated that *restitutio in integrum* 'is a contractual remedy flowing from the cancellation of the contract.'<sup>52</sup> This is in line with the leading academic view put forward by Wouter de Vos. He argues that *restitutio in integrum* is a contractual remedy because there are two good reasons for excluding it from the law of unjustified enrichment.<sup>53</sup> These are as follows: first, with a *restitutio in integrum* claim an innocent loss of enrichment does not excuse either party from the duty to restore the actual goods or their value. This contrasts with unjustified enrichment remedies where only negligent or intentional loss of enrichment requires reimbursement.<sup>54</sup> Secondly, with a *restitutio in integrum* claim interest is calculated from the date that the contractual payment was due. This contrasts with an enrichment claim where interest is calculated from the date when the enrichment claim is perfected (*litis contestatio*).<sup>55</sup> The point underlying De Vos's analysis is that classifying *restitutio in integrum* as an enrichment remedy would lead to unjust results. This analysis is consistent with my approach to choosing between defensible doctrinal alternatives since it considers the

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<sup>51</sup> Whitty, 'The Taxonomy of Unjustified Enrichment in Scots Law' (essay prepared for a seminar on the law of unjustified enrichment, University of Edinburgh, October 1993), 17; Stewart, *The Law of Restitution in Scotland* (1992), 214; Du Plessis, *Compulsion and Restitution: A historical and comparative study of the treatment of compulsion in Scottish private law with particular emphasis on its relevance to the law of restitution or unjustified enrichment* (unpublished Ph.D. Thesis, University of Aberdeen, 1997) and Hogg, *Obligations* (2003), paras 4.78-9.

<sup>52</sup> *Johnson v Jainodien* 1982 (4) SA 599 (C) at 605. See also *Davidson v Bonafede* 1981 (2) SA 501 (C) at 510 and *Yorkshire Insurance Co. Ltd v Ismail* 1957 (1) SA 353 (T) at 364.

<sup>53</sup> De Vos, *Verrykingsaanspreeklikheid* (1987), 158. Although De Vos does not expressly state that *restitutio in integrum* is a contractual remedy, it seems safe to assume that this is his view from the fact that he categorically excludes it from the law of unjustified enrichment. Subsequent authors have all taken De Vos' view to be that *restitutio in integrum* is contractual. See for example Cockrell, 'The Hegemony of Contract' (1998) 115 *SA LJ* 286 at 294 n44 and Visser, (1992) *AJ* 211.

<sup>54</sup> De Vos, *Verrykingsaanspreeklikheid* (1987), 158-9.

<sup>55</sup> De Vos, *Verrykingsaanspreeklikheid* (1987), 159. This has now been superseded by section 2A of the Prescribed Rate of Interest Act 7 of 1997, which states that every unliquidated debt will bear interest at the rate determined by the Minister of Justice. Although the matter cannot be regarded as finally settled, there is authority in Scots law that interest in an enrichment claim is calculated from the date of payment. See *Countess of Cromertie v Lord Advocate* (1871) 9 M 988 at 991; *Gwilym v Lord Advocate* (1894) 2 SLT 260 and *Duncan, Galloway and Co. Ltd v Duncan, Falconer and Co.* 1913 SC 265. For a full discussion see Scottish Law Commission, *Recovery of Benefits Conferred under Error of Law* (Discussion Paper No. 95, vol. 2, 1993), paras 2.126-35.



principles underlying the remedy and the consequences of imposing liability according to a set of doctrinal rules. Although the analysis is not complete, it is a welcome platform.

Unsurprisingly, *restitutio in integrum* has not gone unnoticed by those who see an increased role for unjustified enrichment after contractual failure. Recently, Daniel Visser has argued that *restitutio in integrum* ought to be reclassified as an enrichment remedy.<sup>56</sup> One of the main reasons cited in support of this argument is that *restitutio in integrum* is doctrinally more closely aligned to an enrichment action than to a contractual action. This, he contends, is because *restitutio in integrum* is not aimed at fulfilling the parties' contractual expectations but is aimed instead at restoring both parties to the positions they would have occupied prior to the enriching event (the rendering of the contractual performances).<sup>57</sup> This is identical to the abstract taxonomic argument encountered in respect of restitution after termination for breach. The point made there applies equally here: although it is doctrinally possible to classify *restitutio in integrum* as an enrichment remedy, this does not preclude the possibility of classifying it as contractual. Indeed, a contractual analysis represents the current law in South Africa. Accordingly, this represents another instance where South African and Scots law have a choice between two doctrinally defensible alternatives.

(ii) *Restitutio in Integrum*: Contract or Unjustified Enrichment?

In line with my central thesis on the appropriate method of choosing between

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<sup>56</sup> Visser, (1992) *AJ* 211-25. For Scots commentators who also favour an enrichment approach see Clive, *Judicial Abolition of the Error of Law Rule and its Aftermath*, (Appendix to Scottish Law Commission, Discussion Paper No 99, 1996), rules 2(3) and 5(3) and Thomson, 'Obligations Ordinary' in Lomnicka and Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honour of Professor A G Guest* (1997), 195 at 198-9. Cf MacQueen, 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' in Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (1997), 199 at 222-3.

<sup>57</sup> Visser, (1992) *AJ* 209-10.



defensible doctrinal alternatives, it is necessary to be guided by the principles of recovery underpinning *restitutio in integrum* and the consequences of imposing liability according to a particular doctrinal set of rules. Once again, this is most effectively achieved by testing these doctrinal alternatives against real and hypothetical cases and gauging which set of rules most accurately reflects the principles of recovery underlying *restitutio in integrum*.

In order to uncover these principles of recovery it is useful to start with the stated aim of *restitutio in integrum*. One of the difficulties in this area is that this aim is expressed in two subtly different ways. On the one hand, it is said that *restitutio in integrum* aims to restore both parties to the positions they would have occupied *status ante quo* the conclusion of the contract.<sup>58</sup> On the other hand, it is also said that *restitutio in integrum* aims to 'put the parties ... into the position in which they would have been had the contract not been concluded.'<sup>59</sup> Although both formulations will frequently produce the same results, the fact that the two formulations have different perspectives means that this is not necessarily true. The first formulation is entirely backward looking and focuses exclusively on the parties' pre-contractual positions. The second formulation focuses instead on the position the parties would presently have been in had the contract not been concluded. The following example from *Davidson v Bonafede*<sup>60</sup> neatly illustrates the point. The truncated facts were as follows. The purchaser entered into a contract to buy the seller's house. The purchaser paid the purchase price partly with money withdrawn from a fixed deposit account and partly with money borrowed from a bank. As a result of the seller's fraudulent misrepresentation, the purchaser terminated

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<sup>58</sup> *Davidson v Bonafede* 1981 (2) SA 501 (C) at 511. See also Van der Merwe *et al.*, *Contract: General Principles* (2003), 122 and MacQueen and Thomson, *Contract Law in Scotland* (2000), para. 4.9.

<sup>59</sup> *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 (3) SA 739 (NC) at 743.

<sup>60</sup> 1981(2) SA 501 (C).

the contract and tendered the return of the house. In order to place the purchaser in the position he would have been in before the contract was concluded, the seller would need (a) to return the purchase price to the purchaser and (b) to reimburse the purchaser for all his *wasted expenses* incurred as a result of entering into the transaction. This would include the interest paid on the bank loan. However, in order to place the purchaser in the position he would have been in presently had he not entered into the contract, the seller would, in addition, have to reimburse the purchaser for the interest he lost by withdrawing money from his fixed deposit account.

Although the first formulation accurately reflects the aim of *restitutio in integrum* from the guilty party's perspective, the second formulation more accurately expresses the aim of *restitutio in integrum* from the aggrieved party's perspective. With this in mind, it now becomes necessary to separate those cases in which the facts giving rise to the right to terminate the voidable contract also disclose a cause of action in delict from those cases where the facts giving rise to the right to terminate the contract do not, in addition, disclose a cause of action in delict. This is important because it affects the moral blameworthiness of the party whose conduct gave rise to the right to terminate the contract and, as such, can be a significant indicator of the just outcomes that ought to be reached in both types of cases.

(a) *Restitutio in Integrum* with Delictual Claims

When the facts which give rise to the right to terminate the contract also satisfy the requirements for a delictual claim, South African and Scots law are identical: the

aggrieved party is granted a delictual claim in addition to a claim for *restitutio in integrum*.<sup>61</sup> Common examples are cases involving fraudulent and negligent misrepresentations. In these cases, a just outcome will be achieved if three principles are followed: first, that all the financially deleterious effects of the misrepresentation are reversed; secondly, that the aggrieved party is not left in a better position now that the contract has failed than he would have been in had he not entered into the contract and thirdly, that the guilty party is made to bear the loss resulting from accidental damage to, or destruction of, the subject matter of the sale.<sup>62</sup> The question that arises is whether classifying *restitutio in integrum* as an enrichment remedy accurately reflects these principles.

In terms of the existing law, the aggrieved party has two choices. First, he could institute a claim exclusively in delict. From this claim he would recover the amount by which his patrimony has been diminished as a result of the guilty party's wrongful conduct.<sup>63</sup> This would include the right to reclaim any performance rendered under the contract (or a monetary substitute thereof). Secondly, the aggrieved party could institute a claim for *restitutio in integrum*. The amount he would receive from this claim is identical to the amount recoverable in delict. This is because the claim for *restitutio in integrum* allows recovery for all sums (or the return of property) required to place the aggrieved party in the position he would have occupied presently had he not entered into the contract.

Irrespective of whether the aggrieved party institutes a claim in delict or a claim for *restitutio in integrum*, he is obliged to return to the guilty party any performance he

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<sup>61</sup> For a discussion of the remedies after termination of a contract which is voidable by reason of improperly obtained consent see Van der Merwe *et al.*, *Contract: General Principles* (2003), 120ff and MacQueen and Thomson, *Contract Law in Scotland* (2000), paras 4.3-9 and 4.60-6.

<sup>62</sup> The analysis assumes that but for the misrepresentation the aggrieved party would not have entered into the contract.

<sup>63</sup> *Trotman v Edwick* 1951 (1) SA 443 (A) at 449.

received under the contract. If there was no such obligation, then the aggrieved party would be left unjustifiably in a better position now that the contract had failed than if he had not entered into the contract.

Crucially, neither solution relies on unjustified enrichment to give effect to the principles underlying recovery in these cases. In fact the desired result would actually be precluded if *restitutio in integrum* was an enrichment remedy. For example, if the purchaser in *Davidson v Bonafede* had been limited to an enrichment claim, then he would not have been able to claim the interest he lost as a result of withdrawing funds from his fixed deposit account. Instead, his claim would have been limited to the amount, if any, by which the guilty party had been enriched by his use of that money. This is because the law of unjustified enrichment suffers from a perspective limitation and cannot take into account the aggrieved party's impoverishment that does not also enrich the recipient. In order to achieve the desired result, it would be necessary to grant the aggrieved party a claim in delict for the difference between this enrichment claim and the amount by which he is thereafter still left financially worse off by the misrepresentation.<sup>64</sup> It seems unnecessary to go through the extra step of initially quantifying an enrichment claim when there are already two direct solutions that achieve the desired result.

This demonstrates that the aggrieved party's *restitutio in integrum* claim ought not to be an enrichment action. However, the more limited aims of unjustified enrichment accurately reflect the extent to which the aggrieved party ought to be liable to the guilty party in these cases. As the guilty party is morally responsible for causing the loss to the aggrieved party, the law ought not to be concerned that the guilty party might be left in

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<sup>64</sup> The principles of recovery underpinning the aggrieved party's claim also dictate that he ought not to bear the risk of accidental damage to, or destruction of, the subject matter of the sale. Even if *restitutio in integrum* is classified as an enrichment remedy, this would be unproblematic as the aggrieved party's delictual claim would negate the effects of the change of position defence.

a worse position after termination than he would have been in had he not entered the contract. If the purchaser in *Davidson v Bonafede* rather than the seller had made the fraudulent misrepresentation, then it seems right that he should not to be allowed to claim the interest he lost by withdrawing part of the purchase price from his fixed deposit account. Instead, his claim ought to be restricted to the exact amount by which the aggrieved party had been enriched by his use of that money.<sup>65</sup>

Furthermore, one of the principles underlying the imposition of liability in these cases is that the guilty party should bear the loss resulting from accidental damage to, or destruction of, the subject matter of the sale. This suggests that the aggrieved party ought to have recourse to the loss of enrichment defence to repel (or partially repel) the guilty party's claim.<sup>66</sup> The potential clash between the availability of the loss of enrichment defence and the contractual risk rules in breach cases is avoided in cases where voidable contracts are terminated. This is because voidable contracts which have been terminated are treated as if they never existed and this justifies setting aside any contractual allocation of risk.

This analysis demonstrates that the claims of the aggrieved party and the guilty party after the termination of a voidable contracts in this category ought to rest on different doctrinal bases. Although this is not doctrinally symmetrical, the principles underpinning the imposition of liability in these cases reveal that there are good reasons why symmetry ought not to matter.

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<sup>65</sup> This would usually be the amount of interest that the aggrieved party had earned by depositing the money in a bank account.

<sup>66</sup> The effective use of the loss of enrichment defence means that the guilty party will not be put into the position he would have occupied presently had he not entered into the contract. This is unproblematic as the important principle underlying recovery in these circumstances is that the guilty party ought to bear the loss resulting from accidental damage to, or destruction of, the subject matter of the sale.

In these cases, the facts which justify termination do not simultaneously disclose a cause of action in delict. This arises most commonly in cases of innocent misrepresentation. South African law and Scots law grant the misrepresentee the right to terminate the contract and thereafter, the right to claim *restitutio in integrum*.<sup>67</sup>

As the misrepresentation in these cases is innocent, the misrepresenter is less morally culpable than someone who made a negligent or fraudulent misrepresentation. The question that arises is how, if at all, this effects the extent of each party's liability.

In respect of the misrepresentee's claim, there are two possibilities. First, it could be argued as the misrepresentee has nonetheless suffered a misrepresentation, the fact that it is innocent ought not to matter. If this is accepted, then the principles underlying the imposition of liability dictate that the aggrieved party ought not to be left in a worse position than he would have been in presently had he not entered into the contract.<sup>68</sup> This means that there would be no relevant distinction between a fraudulent, negligent and innocent misrepresentation.<sup>69</sup>

Alternatively, it could be argued that as both parties are morally blameless (the misrepresenter having made neither a careless nor a dishonest misrepresentation), this

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<sup>67</sup> *Boyd & Forest v Glasgow and South-Western Railway Co.* 1915 SC (HL) 20 and *Glass v Hyde* 1932 WLD 19. For a detailed discussion of the South African law see Hutchison, *Damages for Non-Fraudulent Misrepresentation in English and South African Law* (unpublished Ph.D. Thesis, University of Cambridge, 1979), 96-108. For a discussion of the law in Scotland see McBryde, *The Law of Contract in Scotland* (2001), para. 15-53ff.

<sup>68</sup> It is once again assumed that but for the misrepresentation the aggrieved party would not have entered into the contract.

<sup>69</sup> The question about an appropriate doctrinal basis of awarding damages for innocent misrepresentation has caused considerable difficulty in South African law. See Hutchison, *Damages for Non-Fraudulent Misrepresentation in English and South African Law* (unpublished Ph.D. Thesis, University of Cambridge 1979), 167-73.

justifies leaving any consequential loss to lie where it falls.<sup>70</sup> If this is accepted, then the principles underlying the imposition of liability incline towards limiting the misrepresentee's claim to the extent of the innocent misrepresenter's enrichment.<sup>71</sup>

Although both arguments are defensible, on balance, it seems slightly harder to justify why the misrepresentee should suffer any loss, given that it was the misrepresenter's error that induced the misrepresentee to enter into the contract in the first place. The important point is that if this is accepted, then limiting the misrepresentee's restitution claim to the extent of the misrepresenter's unjustified enrichment is out of line with the principles underlying the imposition of liability in these cases.

For the same reason that it is harder to justify why the misrepresentee ought to bear any loss in these cases, it is probably correct to limit the misrepresenter's claim against the misrepresentee to the extent of the latter's unjustified enrichment.

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<sup>70</sup> *Phame v Paizes* 1973 (3) SA 397 (A) at 402. See also Hutchison, *Damages for Non-Fraudulent Misrepresentation in English and South African Law* (unpublished Ph.D. Thesis, University of Cambridge, 1979), 167-73.

<sup>71</sup> See Olivier, 'Aedilisie Aksies Weens Verborge Gebreke' (1963) 26 *THRHR* 173 and Olivier, 'Aanspreeklikheid weens Onskuldige Wanvoorstelling by Kontraksluiting' (1964) 27 *THRHR* 20.

## Chapter 8

### Conclusions

This thesis concentrated on selected consequences of contractual failure in South African and Scots law in comparative perspective. Three species of contractual failure were under review: termination after breach; termination after supervening impossibility/frustration; and termination of a contract which is voidable by reason of improperly obtained consent. The nine questions considered and the conclusions reached were as follows.

#### **8.1 What effect does termination for breach have on the contractual nexus between the parties?**

In order to explain the effect of termination for breach, I argued that the real substantive work is done by the disparate doctrines that make up this effect rather than by abstract generalisations about the overall effect of termination on the contractual nexus between the parties. It is accordingly critical that both South African and Scots law clearly articulate these doctrines and the relationships between them. I suggested that it was necessary to formulate the following six rules, supplemented by one definition, to achieve this aim.

##### Rule One

*Any performance obligation which is unperformed at the time of termination for breach is extinguished by termination if the right which is correlative to this unperformed obligation does not fall within the doctrine of accrued rights.*



## Rule Two [the corollary of rule one]

*Any performance obligation which is unperformed at the time of termination for breach survives termination for breach if the right which is correlative to this unperformed obligation falls within the doctrine of accrued rights.*

## Rule Three

*A contracting party (X) has a duty to restore to the other contracting party (Y) any contractual performance (or its value) received prior to termination for breach unless Y's right to demand the exact reciprocal performance from X would have fallen under the doctrine of accrued rights but for the fact that X has already fulfilled the obligation that is correlative to Y's right.*

## Rule Four

*A contracting party (X) also has a duty to restore to the other contracting party (Y) any contractual performance (or its value) received prior to termination for breach unless Y's right to demand the exact reciprocal performance from X survives termination for breach because it falls within the doctrine of accrued rights*

## Rule Five

*All clauses designed to have effect after termination for breach are enforceable after termination for breach subject to the restrictions relating to public policy and liquidate damages clauses.*

## Rule Six

*If the aggrieved party has suffered a loss as a result of a breach of contract, he is entitled to an award of contractual damages to place him in the position he would have occupied presently had there been no breach.*

## Definition of an Accrued Right

*An accrued means those rights that survive termination for breach. [See chapter three for a comprehensive analysis of when this occurs].*

The following table depicts the first four rules:

	UNACCRUED	ACCRUED
UNPERFORMED	Rule 1	Rule 2
PERFORMED	Rule 3	Rule 4

It was established that termination sometimes operates retrospectively only, sometimes retrospectively as well as prospectively, and sometimes prospectively only. Importantly, the retrospective effect does not mean that the contractual nexus is treated as if it never came into being. According to the transformation theory, it means that only the primary performance obligations are annulled by termination. These are replaced by secondary obligations to restore performances received and to pay damages.

The prospective effect of termination means that the contractual nexus is severed only in so far as this nexus is not represented by obligations whose correlative rights (i) fall under the doctrine of accrued rights and/or (ii) would have fallen under the doctrine of accrued rights but for the fact that these obligations have been validly discharged by performance. Termination for breach operates prospectively *only* if all rights to contractual performances whose correlative obligations have been discharged by performance fall under (ii) and if all rights to contractual performances due and enforceable fall under (i).

## **8.2 When does a right to a contractual performance survive termination for breach and termination for supervening impossibility of performance/frustration?**

It was demonstrated that Scots law has much to learn from South African law

about accrued rights. It is settled that a right will survive termination for breach in South African law if it is, immediately prior to termination, accrued, due and enforceable and independent of the executory part of the contract. This doctrine has two limbs. According to the first limb, the holder of a right must, at the time of termination, have been able to insist that the other contracting party perform that right's correlative obligation. Although the right of retention/*exceptio non adimpleti contractus* is not directly applicable after termination for breach, it was established that the relationship between these defences and the 'enforceability' requirement of the first leg of the accrued rights test is encapsulated in the following principle: if the aggrieved party could have raised the right of retention/*exceptio non adimpleti contractus* against the contract breaker immediately prior to termination, then the right to the performance repelled by this defence will not fall under the doctrine of accrued rights.

The second leg of the test is best explained by the twin concepts of reciprocity and severability. For a right to survive termination for breach it must be counter-balanced by a reciprocal obligation (i.e an obligation that is reciprocal to that right's correlative obligation) that is capable of being severed from other unperformed reciprocal obligation couplets.

Despite the conceptual clarity of South African law, it was demonstrated that it can be problematic to work out which contractual obligations are reciprocal to each other. The analysis of *Shelagatha Property Investments* revealed that it can sometimes be helpful to enquire whether policy factors favour a particular conclusion. In this regard it is particularly important to see whether the survival of an accrued right would negatively prejudice the aggrieved party. Analysis demonstrated that this can become an issue in the case of insolvency.

It was demonstrated that Scots law would make the following improvements by adopting South African law's formulation of accrued rights. First, Scots law would avoid

interpreting the principle of mutuality to mean that the party in breach cannot, in any circumstances, sue on the contract. Secondly, Scots law would not allow the right of retention to be used after termination for breach. Thirdly, Scots law would jettison the distinction between the payment of the contract price and an advance payment against a subsequent liability to pay the contract price to resolve cases that ought to be resolved by applying the doctrines set out in the rules.

Adopting this proposal will not involve a big step for Scots law as *Gibson v McNaughton*, *Turnbull v McLean*, and *Lloyds Bank plc v Bamberger* can be taken to support South African law's formulation of accrued rights.

### **8.3 When does the right to restitution arise after termination for breach?**

In order to answer this question, it is necessary to distinguish between the following contexts in which the right to restitution arises: (i) restitution of a returnable benefit; (ii) restitution of money from a co-contractant; (iii) restitution of money from a third party; and (iv) restitution of an inherently non-returnable benefit. In addition, it is sometimes necessary to consider the contract breaker's claim and the aggrieved party's claim independently.

#### **8.3.1 Restitution of Returnable Benefits**

It is right in principle that both the aggrieved party and the contract breaker have the right to claim restitution of returnable benefits after termination for breach. The fact that the aggrieved party cannot make exact restitution should not prevent the termination of the contract. Both South African law and Scots law should allow

restitution by way of financial substitute. This will clear the way for a principled evaluation of the critical issue that arises in this context: who should bear the risk of accidental loss of, or damage to, the subject matter of the sale? It was argued that on balance the argument favours respecting the ordinary contractual risk rules (i.e. that the purchaser bears the risk of accidental damage to, or destruction of, the goods). It follows from this that the change of position defence is inappropriate in these cases and that the law of contract should regulate restitution of returnable benefits in South African and Scots law.

### 8.3.2 Restitution of Money from a Co-Contractant

#### (i) *Aggrieved Party's Claim*

It is right in principle that the aggrieved party can claim restitution of money after termination for breach. This is uncontentious in South African law. Only the problematic *Connelly v Simpson* stands in the way of Scots law following the position in principle. It was argued that Scots law should reject this case and follow the other cases that support the position in principle.

It was argued that the receipt of a counter-performance should not affect the aggrieved party's claim for restitution of money. This requires the recognition that the inability to make exact counter-restitution should not prevent the aggrieved party from terminating the contract. The court should always be prepared to award restitution by way of a financial substitute. Finally, the courts should recognise a correlation between the aggrieved party's claim for restitution of money and the contract breaker's restitution claim for the value of his inherently non-returnable performance. In other

words, the courts must recognise that the aggrieved party is under a corresponding duty to make counter-restitution when claiming restitution himself.

(ii) *Contract Breaker's Claim*

In line with the view that the aggrieved party is under a corresponding duty to make counter-restitution when claiming restitution himself, it is correct in principle that the contract breaker has the right to claim restitution of money.

### 8.3.3 Restitution of Money from a Third Party

Restitution claims from third parties have arisen in the context of assignments in freight cases. I argued that Scots law and South African law should support the 'first tier' policy decision that the transfer of money satisfies the *sine causa* requirement for an enrichment action. It was argued that policy factors on the 'second tier' should then determine whether the enrichment action should succeed in any particular case. In the context of assignments in freight cases, it was argued that although the case is not watertight, the policy factors indicate that it is better not to allow the hirer of a ship an enrichment action against a third party financial institution.

Although the issue here does not concern a choice between defensible doctrinal alternatives, an analogous theme emerges. In deciding whether this enrichment claim ought to succeed, it was argued that abstract taxonomic factors are not decisive. Instead, clearly articulated policy factors derived from the two contractual relationships ought to decide whether the retention of the payment is unjustified for the purposes of the enrichment-based restitution claim against the third party.

### 8.3.4 Restitution of Inherently Non-Returnable Benefits

The claim for restitution of an inherently non-returnable benefit yielding an end product is most commonly triggered by the utilisation of that benefit. When the performance does not yield an end product, the right to restitution will arise where utilisation is coupled with a voluntary intention to accept the benefits. There is no substantive difference between these tests as utilisation of a performance yielding an end product necessarily incorporates a voluntary intention to accept that performance.

I argued that the tests used to overcome subjective devaluation in English law are useful in articulating the reasons why the right to restitution arises. The ‘incontrovertible benefit’ test explains those cases where it is unconscionable for the recipient to argue that the benefit is not worth anything to him. This occurs, for example, where the aggrieved party does not utilise the benefit in circumstances that benefit increases the value of his land in a way that this increase is readily realisable. The ‘bargained-for’ test explains those cases where the recipient received part of what he had contracted for in circumstances where it is unfair for him to say that he has not benefited from that performance. This test is particularly useful when the breach does not affect the quality of the part performance. Finally the ‘limited acceptance’ test explains those cases where the recipient utilises the performance. This test is useful, for example, when a developer/employer uses a contractor’s part performance to complete the work.

It was pointed out that it does not follow from using the tests of enrichment to determine when the right to restitution arises that this remedy is necessarily an enrichment action. It was demonstrated that this analysis can be accommodated by contract law.

## **8.4 When the right to restitution arises after termination for breach, what is the quantum of this claim?**

### **8.4.1 Restitution of Returnable Benefits**

In these cases both parties are under an obligation to return the specific thing received. Where this is not possible the value of the returnable benefit must be restored.

### **8.4.2 Restitution of Money**

In these cases both parties are entitled to reclaim the full contract price. The tricky case is where this will allow the aggrieved party to escape the consequences of a bad bargain. It was argued that the policy of the law should favour the aggrieved party rather than the contract breaker even if this means that the aggrieved party sometimes escapes a bad bargain. Accordingly, the aggrieved party's claim for restitution of money should not be limited by his expectation interest.

### **8.4.3 Restitution of Inherently Non-Returnable Benefits**

#### **(i) *Contract Breaker's Claim***

As the aggrieved party is entitled to set off any contractual damages against the contract breaker's restitution claim, the method of calculating the contract breaker's restitution claim will affect the quantum recoverable where (a) that method causes the sum of the quantum of restitution and the amount paid to the second contractor to



exceed the original contract price (in circumstances where other methods would not have this effect) and (b) where the sum of the quantum of restitution and the amount paid to the second contractor is less than the original contract price. The latter will occur when the contract breaker has entered into a winning contract.

In a winning contract, it was argued that the contract breaker should be entitled to claim a sum equal to the extent of the aggrieved party's enrichment. This should be the lower of the market value of this performance and the increase in the aggrieved party's patrimony.

(ii) *Aggrieved Party's Claim*

It was argued that the aggrieved party's restitution claim should not be restricted by his expectation interest or by the total contract price and only sometimes by the pro rata contract price. In cases where the aggrieved party has not articulated the reasons for entering into the losing contract and the contract breaker should not reasonably have known these reasons, it seems right to measure the aggrieved party's restitution claim with reference to the pro rata contract price making the adjustment, when necessary, for the fact that early performance can be more expensive than later performance. This result will not necessarily be achieved if the aggrieved party is entitled to a restitution claim measured with reference to the objective market value of his performance. I argued that it looks very much as though the law of contract is actually providing the solution to these cases. This solution achieves the right balance between ensuring that the contract breaker does not get a benefit without having to pay for it and ensuring that the aggrieved party does not gain a windfall benefit as a result of the contract breaker's breach.

In cases where these reasons are articulated or ought reasonably to have been known, it seems right to allow the aggrieved party a restitution claim greater than the pro rata contract price. The right balance in these cases is probably achieved by granting the aggrieved party a restitution claim based on the lesser of the cost of his performance and the market value of that performance. It was argued that as unjustified enrichment can only achieve the right result in a small number of cases, it should be left to the courts to develop a contractual rule to achieve this right result.

**8.5 Should restitution after termination for breach be regulated by the law of contract, the law of unjustified enrichment, or sometimes by the law of contract and sometimes by the law of unjustified enrichment?**

In respect of claims for restitution of returnable benefits and for restitution of money it was argued that in the majority of cases it makes no difference whether these restitution claims are seen as contractual or enrichment-based. The tricky case is where the aggrieved purchaser of goods cannot return these goods to the seller in circumstances where he is not to blame for this eventuality. As the arguments favoured upholding the ordinary contractual risk rules in these cases, it was submitted that it makes sense to leave it to the law of contract to resolve such cases. Accordingly, there is no good reason to change the existing South African law which regards claims for restitution of returnable benefits and for restitution of money as contractual remedies. In the absence of a definitive statement regarding the doctrinal basis of these restitution

claims, it was suggested that Scots law should follow the South African law and treat these claims as contractual.

In respect of claims for restitution of inherently non-returnable benefits, I argued that the principles underlying the contract breaker's restitution claim will be met if this claim is an enrichment action.

It was argued that the aggrieved party's restitution claim should not be an enrichment action. This was for two reasons. First, if restitution is limited either by the total contract price or by the pro rata contract price (even in the valuation sense), then it looks very much as though the law of contract is actually providing the solution to these cases. Secondly, if it is right to take into account the fact that the aggrieved party's early performance can be more expensive than his later performance and that it is sometimes desirable to take into account the reasons why an aggrieved party deliberately entered into a losing bargain, the law of unjustified enrichment cannot achieve just results in these cases. This is because the law of enrichment suffers from a fundamental perspective limitation: it can only view matters in this regard from the viewpoint of the recipient of a benefit.

## **8.6 Is unjustified enrichment the appropriate doctrinal basis for redressing the economic imbalances after supervening impossibility of performance/frustration?**

It was argued that the rules of unjustified enrichment do not accurately reflect the principles underpinning the claim designed to redress the economic imbalances between the parties after supervening impossibility of performance/frustration. This is because of the twin facts that the rules of unjustified enrichment are ill-equipped to

apportion losses between the parties and that it is normatively desirable to apportion these losses in some cases. As a result, the courts in South Africa and Scotland should be granted the power to apportion losses according to a clear set of principles.

It was argued that the following principles should guide the courts when deciding whether to apportion losses. First, losses should not be apportioned where the party incurring this expenditure retains a realisable benefit as a result of that expenditure. Secondly, losses should be apportioned if the party incurring the loss would not have benefited from the expenditure leading to the loss had the frustrating event not occurred. Thirdly, losses should be apportioned if the party incurring the loss would not have incurred the expenditure leading to the loss if he had not been contracting with his co-contractant in particular. Finally, losses should be apportioned if the party incurring the loss only incurred the expenditure leading to the loss because he was contracting with his co-contractant in particular and would not have agreed to similar expenditure with parties other than that co-contractant or someone qualitatively similar to that co-contractant.

It was pointed out that neither the ‘pure enrichment’ nor the ‘equitable adjustment’ interpretation of *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. Ltd* supports a principled means of loss apportionment. Given that *Cantiere* is so well entrenched in Scots law, it will probably be necessary to introduce loss apportionment by statute.

As *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* has confirmed that each party’s liability after supervening impossibility is limited to the extent of their enrichment, similar legislative intervention will be required to introduce a loss apportionment rule into South African law.

**8.7 Should *restitutio in integrum* be regulated by the law of contract, the law of unjustified enrichment, or sometimes by the law of contract and sometimes by the law of unjustified enrichment?**

It was argued that when *restitutio in integrum* is combined with a delictual claim, justice will be achieved if three principles are followed: first, all the financially deleterious effects of the misrepresentation are reversed; secondly, the aggrieved party is not left in a better position now that the contract has failed, than he would have been in had he not entered the contract; and thirdly, the guilty party is made to bear any loss resulting from accidental damage to, or destruction of, the subject matter of the sale. It was demonstrated that the law of unjustified enrichment cannot ensure that the first principle is upheld. This is because the law of unjustified enrichment cannot compensate the aggrieved party for any impoverishment that does not simultaneously enrich the guilty party. In order to achieve the desired result, the aggrieved party would have to institute a delictual claim for the shortfall. It was pointed out that it seems unnecessary to go through the extra step of quantifying an enrichment claim when instituting a delictual claim or a claim for *restitutio in integrum* achieves the desired result.

It was argued that the more limited aims of unjustified enrichment accurately reflect the extent to which the aggrieved party ought to be liable to the guilty party. This will ensure that the third principle is upheld.

Although the innocent misrepresentor is less morally blameworthy than his negligent or fraudulent counterpart, it was argued that the misrepresentee should not be made to bear any loss as a result of the misrepresentation. Accordingly, the doctrinal basis of both parties' claims should be identical irrespective of whether the facts which support a claim for *restitutio in integrum* also disclose a cause of action in delict.

**8.8 Should the consequences of contractual failure be regulated by the law of contract, the law of unjustified enrichment, or sometimes by the law of contract and sometimes by the law of unjustified enrichment?**

It is clear from the answers to questions four to seven that my view is that the consequences of contractual failure should not have a unitary basis.<sup>1</sup> Although the law of contract and the law of unjustified enrichment will frequently yield the same solution, this is not always the case. The thesis has highlighted those areas where it makes a material difference which solution is chosen.

**8.9 When regulating the consequences of contractual failure, how should a legal system make the choice between defensible doctrinal alternatives?**

This broad question underpins questions three to eight. It was pointed out that the commentators have suggested four approaches to this question. First, a number of South African and Scottish commentators, relying partially on their English counterparts, have argued that the law of unjustified enrichment should play an increased role after termination for breach. This view has relied primarily on abstract taxonomic arguments. Although this scholarship has successfully established that it is theoretically possible to classify these remedies as arising in unjustified enrichment, this

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<sup>1</sup> Cf Hellwege, 'Unwinding Mutual Contracts: *Restitutio in Integrum* v. *The Defence of Change of Position*' in Johnston and Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), 243 at 262ff. It is clear from the tenor of the argument presented in this thesis that I disagree with Hellwege's claim that the consequences of contractual failure should be treated in a uniform way.

finding does not preclude the theoretical possibility of classifying these remedies as contractual. This demonstrated that there is no argument based on prior logic that determines the doctrinal basis of the remedies under review.

Secondly, the transformation theory was used to support a contractual analysis of restitution after termination for breach. It was pointed out that although the transformation theory can provide a useful theoretical explanation of this contractual analysis, it suffers from the same defects as the abstract taxonomic enrichment argument.

Thirdly, the contractual explanation of restitution and the claim to redress the economic imbalances after frustration is supported by an historical analysis of the *condictio causa data causa non secuta*. It was argued that as both South African law and Scots law are moving towards a more generalised approach to enrichment liability, the precise scope of the specific *condictiones* diminishes in importance in favour of a more principled and conceptual approach.

Fourthly, the comparative approach demonstrated that various legal systems can, and in fact do, legitimately differ in their approach to the doctrinal basis of the remedies under review. This demonstrated that both in practice and in logic these remedies can arise in either contract or unjustified enrichment.

As none of the above approaches yielded a satisfactory answer to the doctrinal basis of the claims under review, I argued that the choice between doctrinal alternatives ought to be made after careful consideration of the principles of recovery underpinning a particular remedy and the consequences of imposing liability according to a particular doctrinal set of rules. In my view, the proper doctrinal basis of a particular remedy is the one which, having due regard to the consequences of imposing liability according to a doctrinal set of rules, most accurately reflects these principles of recovery. It was

demonstrated that our intuitions about the just results that ought to be reached in real and hypothetical cases indicated that three general factors were critical in distilling the principles of recovery underpinning the remedies under review: the role of the contract price in determining the quantum of recovery after contractual failure; the contractual allocation of risk; and the incidence of fault in the circumstances leading to contractual failure. The last of these factors is also a key feature in distinguishing between contracts terminated for supervening impossibility of performance/frustration and the other two species of contractual failure. This indicated that the features which differentiate the three species of contractual failure also played an important role in distilling the principles of recovery underpinning the claims under review.

In respect of the consequences of imposing liability according to a particular set of doctrinal rules, it was demonstrated that two considerations were critical. First, unjustified enrichment law necessarily brings with it the change of position/loss of enrichment defence and secondly, once impoverishment of the pursuer is established, unjustified enrichment law suffers from a perspective limitation in that it is restricted to viewing matters exclusively from the perspective of the recipient of a benefit.

I argued that the law of unjustified enrichment is in many cases insufficiently sensitive to the principles of recovery underpinning the claims under review. This is for two reasons. First, unjustified enrichment is tied to imposing liability according to a single principle, namely, that no one should be unjustifiably enriched at another's expense. Secondly, where liability ought to rest on other principles, the unjustified enrichment doctrines that buttress the general principle are often too blunt or narrow to take these other principles into account. I argued that in the majority of cases contract law is, or can be adapted to be, more sensitive to these principles of recovery than the law of unjustified enrichment. This is because contract law is constituted by a broader



and more complex set of principles than the law of unjustified enrichment.

Furthermore, even where liability does rest on the principle that no one should be unjustifiably enriched at another's expense, this can often be accommodated by contract law. Accordingly, where a legal system has a choice between a contractual solution and an unjustified enrichment solution, contract law will often enable a more just solution than the law of unjustified enrichment.

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## Legislation

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New South Wales Frustrated Contracts Act 1978  
Sale of Goods Act 1979 (as amended)  
South Australian Frustrated Contracts Act 1988  
Prescribed Rate of Interest Act 7 of 1997  
Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045)



## List of Abbreviations

<i>AJ</i>	Acta Juridica
<i>Columbia LR</i>	Columbia Law Review
<i>CLP</i>	Current Legal Problems
<i>CLJ</i>	Cambridge Law Journal
<i>JBL</i>	Journal of Business Law
<i>JR</i>	Juridical Review
<i>Edin LR</i>	Edinburgh Law Review
<i>HLR</i>	Harvard Law Review
<i>JLS</i>	Journal of Law and Society
<i>LMCLQ</i>	Lloyd's Maritime and Commercial Law Quarterly
<i>LQR</i>	Law Quarterly Review
<i>PECL</i>	Principles of European Contract Law
<i>PICC</i>	Principles of International Commercial Contracts
<i>OJLS</i>	Oxford Journal of Legal Studies
<i>RLR</i>	Restitution Law Review
<i>SALJ</i>	South African Law Journal
<i>SCLR</i>	Scottish Civil Law Reports
<i>S Cal LR</i>	Southern California Law Review
<i>SLPQ</i>	Scottish Law & Practice Quarterly
<i>SLT</i>	Scots Law Times
<i>Stell LR</i>	Stellenbosch Law Review
<i>THRHR</i>	Tydskrift vir die Hedendaagse Romeins-Hollandse Reg
<i>TSAR</i>	Tydsrift vir die Suid-Afrikaanse Reg
<i>UWALR</i>	University of Western Australia Law Review
<i>Yale LJ</i>	Yale Law Journal